UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, et al,	**CIVIL ACTION NUMBER: 2:24 Civ. 04055**
Plaintiffs,	**ORAL ARGUMENT**
v.	
APPLE, INC.,	
Defendant.	

Martin Luther King Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101
Wednesday, November 20, 2024
Commencing at 11:06 a.m.

B E F O R E: **THE HONORABLE JULIEN XAVIER NEALS, UNITED STATES DISTRICT JUDGE**
- and -
THE HONORABLE LEDA D. WETTRE, UNITED STATES MAGISTRATE JUDGE

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I N D E X

(PROCEEDINGS held in open court before **The Honorable JULIEN XAVIER NEALS,** United States District Judge.)

THE COURTROOM DEPUTY: All rise.

The Honorable Julien Xavier Neals presiding.

HON. JULIEN X. NEALS: Good morning. Please be seated.

THE COURTROOM DEPUTY: We are on the record in *United States of America v. Apple;* Case Number 24-cv-4055.

HON. JULIEN X. NEALS: Counsel, your appearances, please.

MR. LASKEN: Yes, your Honor.

Jonathan Lasken, counsel for the United States. May it please the Court.

With me today is Matthew Mandelberg and John Basiak, for the United States Attorney's Office.

Also with us today for the State of New Jersey is Ms. Isabella Pitt and Mr. Brian McDonough and Mr. Giancarlo Piccinini.

HON. JULIEN X. NEALS: Thank you.

MS. WALSH: Good morning, your Honors.

Liza Walsh appearing on behalf of Apple. With me from my firm is Doug Arpert. I will allow my co-counsel to introduce themselves.

We will start with Mr. Primis who will introduce himself and his team.

MR. PRIMIS: Good morning, your Honors.

Craig Primis from Kirkland & Ellis for Apple. With me at counsel table is Devora Allon.

MS. ALLON: Good morning, your Honor.

HON. JULIEN X. NEALS: Good morning.

MR. PRIMIS: Mary Miller.

MS. MILLER: Good morning, your Honor.

MR. PRIMIS: Luke McGuire.

MR. MCGUIRE: Good morning, your Honor.

MR. PRIMIS: And Winn Allen.

MR. ALLEN: Good morning.

MR. PRIMIS: All from Kirkland. And we also, of course, have our client here from Apple.

HON. JULIEN X. NEALS: Good morning.

For counsel's convenience, if you are more comfortable from the lectern, that is fine. If you're more comfortable from counsel table, that is fine as well, just make sure to pull the microphones a little bit closer.

And for those of you who haven't been in the courtroom previously, you didn't walk into a conservatory. The plants are here because they are doing some work in the hall. There is a little sample vote sheet whether we should keep them or not. So fill it out before you leave.

But in all seriousness, I want to thank counsel for the quality of papers we received in this case.

And I mean that sincerely.

I practiced for quite a while. One of the biggest benefits for the Court is when the parties give you everything that you need in terms of making a decision.

The thoroughness of the papers was exemplary. I wanted to just commend all counsel for that before we start the argument.

That being said, this is Apple's motion to dismiss. So, counsel, how would you like to proceed?

MR. PRIMIS: Good morning, again, your Honor.

Craig Primus for Apple. We are the movement, so we will go first.

I hope to give you an outline of what we propose to do today. We also have a handout of slides, which we think will help guide the argument. It's principally quotes from cases and the complaint, but it will help guide things along.

So with that, if I can have one of my colleagues approach and provide those to the Court.

HON. JULIEN X. NEALS: Absolutely.

MR. PRIMIS: Thank you, your Honor.

Thanks for the opportunity to present argument today on Apple's motion to dismiss and also for the kind words about the briefing for both sides. We really appreciate that.

We urge the Court to grant Apple's motion because the government seeks to impose on Apple an antitrust duty to assist

third parties that the Supreme Court has repeatedly rejected.

Because that conduct is not anticompetitive as a matter of law, all of the counts in the first amended complaint fail as a matter of law. Anticompetitive conduct is a critical element in every count of the complaint; and for that reason, the complaint should be dismissed in its entirety.

Each count of the complaint also fails for the additional reason that the government does not link the challenged conduct to any alleged harm in the smartphone market and, therefore, does not sufficiently plead anticompetitive effects, which is another requirement under Section 2's conduct element.

And to make matters worse, the government seeks to advance these novel theories on a threadbare allegation of a so-called monopoly playbook that somehow cuts across every aspect of Apple's business. That pleading failure doesn't even satisfy Rule 8, let alone the sweeping antitrust theories that fail as a matter of law in any event. Even if the Court is inclined to let any portion of the government's case proceed, those allegations must be dismissed.

So today I am going to be dividing the argument with my partner, Devora Allon, who is at counsel table. And if the Court would turn to the second slide in the packet, that is where we set out the agenda for our argument today.

For my part, I am going to focus on our argument that

the refusal to deal doctrine precludes any finding of anticompetitive conduct, including our arguments under *Trinko*, *linkLine* and *Aspen Skiing*.

Ms. Allon is going to argue the balance of the motion. First she will cover the government's failure to adequately allege two other key elements of a monopolization claim that Apple's conduct had some kind of anticompetitive effect and that Apple had monolopy power in a relevant market.

Next we will address the lack of state standing, which is another basis to dismiss the claims brought by the plaintiff states. And finally, we will explain why the government's monopoly playbook and future conduct allegations fail to satisfy the pleading requirements of Rule 8.

We, of course, welcome questions, and we will reserve some time for rebuttal.

If I can ask the Court to turn to the third slide, that is where I am going to start with our first ground for dismissal.

With regard to that first ground, for decades, it has been a core element of any monopolization claim that the government must show that Apple has engaged in anticompetitive conduct. Here, the allegations seeking to establish the supposed anticompetitive conduct fail for a simple and straightforward reason.

As the Supreme Court has said for over a century, the

antitrust laws allow companies like Apple to choose the parties with whom they deal and the terms and conditions of that dealing. Before I dive into the case law -- and there are a lot of cases here -- I want to lay out briefly an overview of this argument and the steps that lead to dismissal.

First, as the cases I will walk through show, Apple's conduct is deemed not anticompetitive as a matter of law if all Apple is alleged to have done is not provide sufficient levels f access or service when it opens its platform to third parties. If Apple is not taking affirmative steps to interfere with or dictate how these third parties deal with Apple's competitors, then Apple's unilateral decisions about the extent of the access it provides to iPhone are not anticompetitive and the anticompetitive conduct claim fails as a matter of law for all claims in the case.

In this situation, the government can only state a claim if it can establish that it meets the sole exception to refusal to deal. And that's the *Aspen Skiing* exception. That exception has at least two elements, and as I will explain below, neither has been alleged here and thus *Aspen Skiing* cannot save this claim.

So with that overview, I want to take a look at what the Supreme Court as said about what type of conduct is protected under Section 2 of the Sherman Act. I would like to start with slide 4 of the packet I gave the Court.

First more than 20 years ago now, the Supreme Court said in *Trinko*, which we have quoted there, that as a general matter the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal. Now, the *Trinko* case is quoting the *Colgate* case, which we also cited in our brief, and that dates back to 1919, more than a century ago.

Colgate stands for that same proposition, and it also says that a business -- and this is a quote. I don't have it on the slide, but it is a quote -- of course, may announce in advance the circumstances under which he will refuse to sell.

So five years after *Trinko*, the Supreme Court came back to this doctrine and affirmed these principles. That's *Pacific Bell vs. LinkLine*, which we do have on the slide. The Court said there that, again, that as a general rule, businesses are free to choose the parties with whom they will deal as well as the prices, terms, and conditions of that dealing. And it later reiterated and this is, quote, *Trinko* holds that a defendant with no antitrust duty to deal with its rivals has no duty to deal under the terms and conditions preferred by those rivals.

So I want to pause here briefly on the language in *LinkLine* referring to rivals.

The government argues that the conduct at issue here,

the so-called "dealing," has to be with our rivals in the market that they pled in order for Apple to get this protection. Put another way, the government says in its brief that this rivals reference in the case law means refusal to deal protections applied only if Apple is refusing to deal with other smartphone manufacturers or Apple's direct rivals in the smartphone market that the government has pled.

Now, these are all antitrust cases that we are citing, both parties, so unsurprisingly they involve rivals in some respects and the Courts refer to rivals in some of the opinions. But no case holds that the protections for refusal to deal only apply where the dispute involves direct rivals in the pled market. This rivals rule the government relies on is a creation of its own making. And recent Court of Appeals cases made clear that this limitation doesn't exist.

If we take a look at *Meta*, for instance, that was a case dismissed on a 12(b)(6) motion. Plaintiffs there allege that Facebook had a monopoly and a market for social networking services, but the developers purportedly blocked by Facebook there were not all rival social networking services.

Same thing in the *Novell* case that we cited. That was authored by Justice Gorsuch when he was on the Tenth Circuit.

There the plaintiff, Novell, alleged that Microsoft Windows' product monopolized the operating system market by cutting off access to Novell, which made word processing

software, not operating systems. Novell wasn't a direct rival in the operating system market. It competed with Microsoft's word pressing applications.

In both cases the Federal Courts of Appeals affirmed dismissal of the Section 2 claim even where the conduct did not directly involve rivals in the market the plaintiff claimed the defendant had monopolized. The allegations in the government's complaint against Apple line up with the allegations in cases like *Meta* and *Novell*.

But at the end of the day, this dispute over what rivals means doesn't really matter, because the government consistently alleges that these third-party developers compete with Apple in markets like messaging, gaming, smartwatches, and so on; and that Apple views them as potential competitive threats to its purported smartphone monopoly.

In that regard I would refer the Court to paragraph 41 of the first amended complaint which alleges that the Apple restricts developers that take advantage of technologies that threaten to disrupt, disintermediate, compete with, or erode Apple's monopoly power. Paragraph 46 makes similar allegations.

The government's brief also shows what its allegations are about, are about what Apple is doing to purportedly -- and this is a quote from their brief at page 15 -- to block competitively threatening apps and accessories. They also

argue in their brief -- and this a quote from page 37 -- that Apple discriminates against competitively threatening technologies. These are the same types of allegations analyzed in *Meta* and *Novell*, and dismissal is likewise warranted here.

Now, I want to turn back it to the Supreme Court decisions I started with.

The fact that *Meta* and *Novell* and the other cases we cite in our brief applied refusal to deal is not surprising because those decisions are in turn applying principles laid out in the Supreme Court decisions.

Each of those decisions rejected claims just like this one at the pleading stage before any discovery had occurred and just on the facts alleged in the complaint.

So let's look at the allegations here and compare them to what the Supreme Court rejected in *Trinko*, *LinkLine*, and the *Meta* decision I referenced earlier.

In this case, the government's allegations boil down to a complaint that Apple has not given third parties enough access to its platform. Or should give different access.

According to the complaint, one way Apple does this is by not granting developers access to certain Apple APIs. And the Court will recall from the tech tutorial that APIs are application programming interfaces that allow apps to communicate with iOS and tell the device to perform certain functions.

On the next slide, slide 5, we have the allegations that get to the heart of this claim. And they show that although Apple allows a lot of access to third parties, in the government's view it doesn't provide enough or the kind of access to Apple's API that the government wants.

So the first is messages, and we reference paragraphs 84 and 85 of the complaint. The claim is that Apple allows third-party messaging apps on iPhone, but it doesn't provide access to the APIs that would allow third-party developers to offer SMS.

Smartwatches, paragraphs 97 and 101, again, the claim is that Apple allows third-part smartwatches to be compatible with iPhone. It just doesn't allow third-party smartwatches to access APIs for certain advanced actionable notifications.

Third is digital wallets, paragraphs 104 and 111. Tap-to-Pay is available to users for various apps on iPhone, but Apple previously did not allow developers access to the near-field communication hardware which you need for Tap-to-Pay in a third-party wallet.

And finally, we have an allegation regarding mini programs, access to APIs, paragraph 69.

Apple allows mini programs, but previously did not allow access to its in-app payment system APIs. So in each case the allegation is just another way of saying Apple provided access to a third party, but it should provide more or a different

access.

If we go to the next slide, we see the other way the government claims Apple doesn't give third parties enough access and that's through Apple's App Store Guidelines. The government wants Apple to set different terms or conditions for some of the apps that Apple already allows on its platform.

So with regard to mini programs, paragraph 69, Apple used to require apps in the United States to display mini programs using a flat, text-only list of mini programs. That is their allegation.

They also complain that Apple used to ban displaying mini programs with icons or tiles, such as descriptive pictures.

Cloud streaming games, paragraph 76, the allegation is that for years Apple imposed the onerous requirement that any cloud streaming game or any update be submitted as a standalone app for approval by Apple.

These allegations are no different than saying Apple must change its own terms and conditions for how it allows third parties to access and utilize its platform.

The government's case is just about giving more or different access to Apple's technology, but we know that type of claim fails as a matter of law and it has been rejected multiple times at the pleading stage. And it has been rejected because this type of conduct does not satisfy the

anticompetitive conduct element of a Section 2 monopolization claim.

So on the next slide we have got *Trinko*. Now, the briefing does tend to focus on the holding in *Trinko* -- and, in fact, that is where I started.

But we would urge the Court to focus on the actual facts that were alleged in Trinko. And we have those facts as described by the Supreme Court. This is the Court describing the complaint in that case.

They said that the complaint alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme. And they explained what that meant. According to the complaint, Verizon has filled orders of its competitors' customers after filling those for its own local phone service and has failed to fill them in a timely manner. In other words, Verizon is putting itself ahead of its competitors in filling customer orders.

The Court went on to say the complaint asserted that the result of Verizon's improper behavior with respect to providing aspect was to deter potential customers of rivals from switching.

That is remarkably similar to what the government pleads here. That Apple allegedly doesn't do enough to support third parties on its platform, therefore, deterring users from switching.

And if we go to slide 8, the next page, you can see that in *Trinko* those allegations failed because they only claimed that Verizon had provided -- and this is a quote -- insufficient assistance to competitors. The Court there said, Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal to deal precedence.

But that is exactly what the government alleges here. Apple allows third parties to do certain things on iPhone, but it doesn't, in some instances, provide all of its APIs to those third parties or guarantee complete parity with Apple products and services.

That conduct, as we just saw from the quotes from *Trinko*, is a lawful refusal to deal; and, therefore, cannot satisfy the anticompetitive conduct element.

I want to look next at *LinkLine*, which is the next Supreme Court decision in this chain; and we have that one on the next slide, slide 9.

In *LinkLine*, the Court picked up on the same point holding that, A firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a sufficient level of service.

Once again, the government alleges the same scenario here. Rivals in various parts of Apple's iPhone business have access, but not in the government's view, a sufficient level of

service. And in *LinkLine*, of course, the Supreme Court said as clearly as it could be said, As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.

Now, there are numerous other Court of Appeals and District Court decisions that come out the same way and we've cited them in our brief; footnote 3. But today I want to come back to the DC Circuit's *Meta* decision, which was decided last year, and we talked about that one earlier.

Meta applied these decision in a very similar context to what we have here; and it affirmed 12(b)(6) dismissal on the same ground, failure to satisfy the anticompetitive conduct element of a Section 2 claim.

Now, the Court probably knows that *Meta* is now the corporate parent name for Facebook, which was the social networking service at issue in that case. The plaintiff states there it challenged Facebook's policies that restricted developer access to Facebook APIs either by, first, prohibiting apps hosted on Facebook that linked or integrated with competing social network services from accessing Facebook APIs; or, two, withholding access to Facebook APIs for any third-party apps that tried to replicate Facebook's core functionality.

On next slide, slide 10, we have the DC Circuit opinion and the DC Circuit rejected plaintiff's claim, which is

essentially the same claim here. There, the Court said that to consider Facebook's policy as a violation of Section 2 would be to suppose that a dominant firm must lend its facilities to its potential competitors. That theory of antitrust law runs into problems under the Supreme Court's *Trinko* opinion.

The Court also said that the States basic allegation that Facebook cut off competitors from access to Facebook's immensely valuable network thus amounts to a claim based upon the defendant's refusal to cooperate with its competitors. And for that reason the Court rejected it.

And, finally, I would note that at page 306 of the DC Circuit opinion it specifically noted that the plaintiffs there made the same allegation as the government here, that Facebook used its policies on accessing the Facebook platform to, quote, degrade the functionality and distribution of potential rivals' content. And the DC Circuit said that is just another way of saying that Facebook refused to deal with its rival on the rivals' preferred terms, which antitrust laws do not require.

All of these cases make clear why the government's allegations fail at the pleading stage.

They only challenge Apple's unilateral decisions about what access to grant third parties on a platform.

Now, I want to emphasize, your Honor, that this is not a case where Apple is doing anything to block third parties in their dealing with others. That can give rise to liability in

certain cases, and those are the cases the government relies on, but it is not what the government alleges in this complaint.

Here, the government does not allege that Apple is telling third parties they can or can't do something when dealing with Apple's competitors.

For example, we'd refer the Court to paragraphs 9 and 54 of the first amended complaint where the government makes clear that its allegations are about Apple's policies on iPhone. The government never alleges we are restricting or setting policies for third parties off of iPhone in any respect. And the case law makes clear how important that distinction is and why it requires dismissal.

So on slide 11, the next one, we have a quote from Justice Gorsuch, again, back when he was on the Tenth Circuit, where he said on behalf of that Court Section 2 misconduct usually involves some assay by the monopolist into the marketplace. In other words, reaching out and requiring other people to do things with other third parties. And it gives examples. He says, To limit the abilities of third parties to deal with rivals; exclusive dealing. To require third parties to purchase a bundle of goods, rather than just the ones they really want; tying. Or to defraud regulators or consumers. And if you are not doing that, it is not a Section 2 claim.

In the *Meta* case, which we discussed on next slide, we

quote that, the Court said here the competitor integration policy limits only how canvas apps on Facebook operate -- these are third parties apps coming on to Facebook -- it limits only how they operate on Facebook. It leaves app developers entirely free to develop applications for Facebook's competitors. The DC Circuit held that theory failed as a matter of law, and it is the same situation we have here.

The cases the government cites to get around *Trinko*, *LinkLine*, and *Meta*, they all involve defendants that prohibited their customers from accessing a customers' -- a competitors' product to service. Nothing like that is addressed here or alleged here. And I want to give some examples.

For example, in the *Eastman Kodak* case that the government cites, the defendant there would not sell photocopier components to customers unless they agreed not to have them serviced by someone other than Kodak. Here, developers are able to create apps for any other smartphone or computer system.

In *Lorain Journal*, that is the one where the only newspaper in town refused to sell advertising space to customers who advertised with a competing local radio station. Apple puts no restrictions on app developers who want to put their apps on Android or any other smartphone, and the government does not allege that we do.

And in *Chase Manufacturing*, that is the Tenth Circuit

case, the defendant refused to sell its insulation product to customers who also bought insulation from a competing supplier. Apple does nothing like that.

And finally, I want to address *Microsoft*, which the government relies on extensively to argue that this case should get past the pleading stage.

I want to pause on this one just to set the table on why the government leans so heavily on *Microsoft*.

In that case, the DC Circuit applied a multi-step framework that includes both burden shifting and balancing to assess whether Microsoft's conduct violated Section 2 of the Sherman Act.

In contrast, under *Trinko* and *LinkLine* and *Meta* and *Novell*, a company's unilateral conduct about the level of access it provides to third parties is protected as matter of law and a defendant is not put to the burden of years of litigation over balancing under *Microsoft*.

The Supreme Court support considers Apple's conduct to be presumptively lawful and entitled to protection at the pleading stage.

HON. JULIEN X. NEALS: Counsel, I am sorry. There is apparently some IT issues that we were advised of by IT with regard to the phone call.

We're just going to take a brief pause and restart the call. I think that will just take a couple of moments.

MR. PRIMIS: Okay. Thank you, your Honor.

(Recess taken 11:34 a.m. to 11:38 a.m.)

HON. JULIEN X. NEALS: We will take just a ten-minute recess and just make sure we take the time to get the IT straight.

It is 11:38. We will come back at 11:48.

THE COURTROOM DEPUTY: All rise.

(Recess taken 11:38 a.m. to. 11:59 a.m.)

THE COURTROOM DEPUTY: All rise.

HON. JULIEN X. NEALS: Please be seated.

MR. PRIMIS: Thank you, your Honor.

I want to return to the point I was making, which is that the law draws a distinction between operating on one's own platform or controlling one's own product and then reaching out into the market to impose restrictions and rules on other third parties that impacts competition.

So I talked about *Eastman Kodak*, which was the tying case involving photocopier components; *Lorain Journal*, which is the newspaper, which says you can't advertise with the competing radio station; and *Chase Manufacturing*, which had exclusive dealing on insulation products. And -- and those are the cases the government relies on to try and get around *Trinko*, *LinkLine*, and *Meta*. And then I had come to *Microsoft*.

And what I was saying about *Microsoft* and the reason why it is important here is that it does set up this multi-step,

burden shifting, balancing framework. That is where the government wants to be, and that will result in years of litigation over these decisions that Apple has made.

We're saying that *Trinko*, *LinkLine*, and *Novell*, which address a company's unilateral decisions about how to -- how much access to provide to third parties, is protected as matter of law, and you don't need to go through years of balancing under *Microsoft* and that those decisions are made at the pleading stage.

So with that background, *Microsoft* is just not like this case. It couldn't be more different.

The government says it is analogous to Apple, and it is just not.

First off, *Microsoft*, I think we should note, was decided before *Trinko*. So that Court didn't have the benefit of the *Trinko* and *LinkLine* decisions. *Microsoft* did not argue that its conduct was protected by refusal to deal. *Microsoft* had 95 percent market share of the relevant worldwide market, which far exceeds Apple's market share.

Microsoft's coercive conduct was fundamentally different from Apple's alleged conduct here. *Microsoft* illegally maintained its monopoly by imposing exclusive dealing obligations on third parties to thwart specific competitors.

The government alleges nothing like that here. There is no allegation that Apple is placing comparable restrictions on

developers' ability to deal with Apple's smartphone rivals.

The government tries to say that some of the allegations at issue in *Microsoft* were restrictions on Microsoft's own platform and, therefore, sufficiently analogous to what we have here.

But the District Court specifically found, and the DC Circuit acknowledged in that case, that these steps were taken in furtherance of Microsoft's plan to impose exclusive dealing obligations on its customers that also wanted to offer products that competed with Microsoft's.

This is exactly how the Third Circuit has described *Microsoft* in the *Dentsply* case.

The Court there said that in *Microsoft* the Court of Appeals for the DC Circuit concluded that, through the use of exclusive contacts with key dealers, a manufacturer foreclosed competitors from a substantial percentage of the available opportunities for product distribution. That's at a 399 F.3d 190.

And there's similar language in *LePage's*, another Third Circuit case cited in the briefs describing *Microsoft* the same way at 324 F.3d. 158 to 159.

There is no comparable claim of exclusive dealing in this case. There is no targeting for destruction of a specific competitor.

This case is worlds apart from what was alleged in

Microsoft and is properly considered under *Trinko*, *LinkLine*, *Meta*, *Novell*, and all of the other cases we have cited. And under those cases, the allegations in the government's complaint amount to lawful refusals to deal which cannot satisfy the conduct element of a Section 2 monopolization claim.

And I would like to pause just for a second and explain why this rule makes sense.

Starting from first principles, the antitrust law believe -- law is believed that it is procompetitive to allow companies to innovate and decide their level of interaction with other third parties. Here, Apple chooses to open up its platform in certain ways. And in doing so, it enhances the platform for users and provides access to Apple's user base for developers. Those are all good things, and they are procompetitive.

But in doing that, Apple has to balance all kinds of considerations when it opens its platform. Will it still work well with all of this non-Apple software on the device? Do we have the resources to make our platform work with all of these third parties? Is there any user demand for a particular feature that a third-party would like to put on the phone? Are there privacy risks? Are there security risks?

The antitrust laws give Apple the freedom to make those decisions.

As we went through the exclusive dealing cases, we know that what Apple can't do is tell one of these developers or a watchmaker that in order to work on Apple, they are prohibited from working on Android. But Apple doesn't do that, and it is not alleged to do that.

Trinko says that Courts are not well-positioned to make these decisions. Courts are not central planners trying to determine where Apple should apply its resources and how the product is going to work if it opens up in a certain way. And just recently the District of Colombia District Court in the *Google* decision applied these very principles relying on all of these same cases to reject a very similar claim because the Court was not in a position to determine when and how Google should advance or promote Microsoft's competing product.

Now, your Honor, once the Court concludes that the refusal to deal framework applies, the only remaining question is whether the government's claims fit that single, narrow circumstance where refusal to deal may be unlawful.

There is a narrow exception to the general protection, to the baseline rule that we just discussed where refusal to deal can satisfy the conduct element of a Sherman Act claim.

The government hasn't come close to alleging that here, which means all of their claims fail to show exclusionary conduct as matter of law.

So *Aspen Skiing* is a case I am talking about. The

Supreme Court in *Trinko* warned that that *Aspen Skiing* decision is at or near the outer boundary of Section 2 liability.

In *Aspen Skiing*, as described by *Trinko*, the Supreme Court found antitrust liability where the defendant had first unilaterally terminated a voluntary, pre-existing, and profitable course of dealing and sacrificed short-term profits to harm long-run competition.

The Third Circuit, Courts in this district, Courts in the District of Columbia in the recent *Google* decision I just mentioned and Courts across the country have indicated that these are the bedrock requirements for an *Aspen Skiing* claim. The Third Circuit in the *Host* decision said that a refusal to deal violates Section 2 only if the parties have a history of dealing paired with facts suggesting a willingness to forsake short-term profits to achieve an anticompetitive end.

And earlier this year in the *Revlimid* antitrust litigation, Judge Salas thoroughly examined the case law and concluded that refusal to deal allegations cannot survive without, quote, alleging the unilateral termination of a voluntary, and thus, presumably profitable course of dealing suggesting a willingness to forsake short-term profits to achieve an anticompetitive end. And Judge Mehta reached the same conclusion in the *Google Search* case that I just mentioned.

The government has not plausibly alleged that Apple

meets these requirements. This complaint contains no allegation that Apple terminated any existing course of dealing, that Apple ceased dealing with any developer, or that Apple withdrew access to any iPhone feature or API. There is no allegation that Apple previously allowed app developers to offer any app on the terms the government now prefers but reversed course.

And because there is no allegation that Apple ever withdrew any pre-existing and profitable access it had provided to developers, the government cannot possibly allege that as a result of that termination, which didn't happen, Apple sacrificed short-term profits to harm competition.

In its opposition, the government did not even attempt to argue that it had pled these *Aspen Skiing* requirements. The government's theory is that to satisfy *Aspen Skiing*, it doesn't need to satisfy those elements, elements that courts all around the country have said are required.

The government's approach is an invitation to legal error, and Judge Salas' thorough opinion in *Revlimid* explains exactly why in rejecting the same argument.

We ask this Court to follow the Supreme Court and the Third Circuit and apply the well-established *Aspen Skiing* requirements.

Apple's alleged conduct is protected by the antitrust laws as a unilateral refusal to deal, and so the government

once again has failed to satisfy the conduct element of the Section 2 claim.

In conclusion on this part of the argument, your Honor, I want to address the government's claim that we are seeking some kind of immunity from the antitrust laws. That is not remotely close to the truth. There are numerous well-defined bases for Section 2 liability. The Third Circuit recognized a number of them in the *West Penn Allegheny Health System* case at 627 F.3d 109. Conspiracy to exclude a rival, hiring a rival's employees not to use them, but to deny them to the rival, a hospital coercing providers not to refer patients to a rival, making false statements about a rival to potential investors and customers. That's the Third Circuit outlining areas, ways in which a company can afoul of Section 2. None are alleged here.

In *Novell* then Judge Gorsuch recognized at Section 2, imposes liability where a defendant, as we discussed, has reached out into the marketplace to do one of a few things. Exclusive dealing, limit ing the ability of third parties to deal with rivals. It doesn't exist here. Tie-in. Requiring third parties to purchase a bundle of goods rather than the ones they really want. Not alleged here. Defrauding regulators or consumers. Not alleged here.

Unlike unilateral refusals to deal, these types of actions may satisfy the anticompetitive conduct element. The

problem with the government is they haven't alleged any of these things. Instead this case lines up squarely with *Trinko*, *LinkLine*, and *Meta*, all dismissed at the pleadings and all of the other decisions that I have covered.

This body of case law overwhelmingly supports dismissal, and the government's cases apply to a situation not alleged here.

These cases show that the government's allegations amount to nothing more than Apple's lawful decisions about the parties with whom they deal and the terms and conditions of that dealing, all legitimate refusals to deal.

These cases also show that unilateral refusals to deal are lawful and do not satisfy the conduct element. That is why we ask that the Court dismiss all counts for failure to plead anticompetitive conduct, a core element of every count in this complaint.

If I may, your Honor, I will turn the podium over to my colleague, my partner, Devora Allon, who will cover the other grounds for dismissal.

HON. JULIEN X. NEALS: Thank you.

MS. ALLON: Good afternoon, your Honors, Devora Allon, from Kirkland & Ellis, for Apple.

I would like to pick up right where Mr. Primis left off. Even under the *Microsoft* balancing framework that the government endorses, the government still fails to plead the

required elements for Section 2 claim.

In *Microsoft*, the Court was clear. We've quoted this language on slide 15, that to be condemned as exclusionary, a monopolist act must have an anticompetitive effect in the relevant market. The Court went on to say no less than the case brought by the government, it must demonstrate that the monopolist's conduct harmed competition.

The Third Circuit echoed that requirement in the *Dentsply* decision. And without it, the government can't meet its burden to show the second element of a Section 2 claim, the willful acquisition or maintenance of monopoly power.

Here, the only alleged markets are the smartphone and performance smartphone markets, that means the government must plausibly allege anticompetitive effects in those markets. Now, the parties disagree on what exactly the standard is for anticompetitive effects and what the government has to plead now to meet that standard.

I am going to address that dispute in a minute, but it doesn't really matter because the government's allegations are insufficient no matter what standard applies.

The fundamental problem with the government's allegations is that they don't include facts that link the challenged conduct to the harms to smartphone competition that the complaint alleges.

Instead -- and I illustrated this on slide 16 -- the

government relies on a series of inferential leaps that lack any factual support.

So what the government does is it pleads some challenge conduct. That is in the blue box at the top left. And then it pleads some harm to smartphone users. That's in the blue box on the lower right. Fewer choices. Higher prices. Reduced quality. But there are no facts in the government's complaint that link Apple's challenge guidelines for super apps or cloud-streaming games or Apple's decisions about third-party API access for messaging apps, smartwatches, or digital wallets to these kinds of harm to smartphone competition.

Instead, the government's theory of harm really boils down to speculation about what third-party developers would do if Apple made different design choices and then more speculation about what consumers would do and whether they would switch from iPhone to other phones as a result of those new features.

So let me just take cloud-streaming games as an example.

The government's theory in its complaint is that if Apple didn't require developers to submit cloud-streaming games for review as a stand-alone app, consumers would buy or switch to smartphones other than iPhone. Now, that allegation of anticompetitive effects requires multiple implausible inferential leaps. First, you have to conclude that without Apple's guidelines for individual review of games and

individual App Store pages for games, developers would actually offer cloud-streaming games in a single app. And you have to conclude that despite the lack of allegations in the complaint that anybody besides Microsoft ever actually complained to Apple about that requirement and despite the lack of any allegation that cloud-streaming games have become more prevalent despite the complaint conceding in paragraph 77 that Apple has stopped enforcing these requirements.

Second, you have to conclude that developers would make their cloud-streaming games available across platforms, so at least on both iPhone and Android.

Third, you have to conclude that those cross-platform streaming games would become popular with a critical mass of consumers.

Fourth, you have to conclude that app-related switching costs are meaningful such that consumers' adoption of a cross-platform streaming game surface could facilitate switching.

And, fifth, you have to conclude that the availability of cloud-streaming apps in both iPhone and Android would be so valuable and so important to consumers that it would spur a critical mass of them to choose cheaper, less-advanced Android phones over iPhone.

The government does not allege any facts supporting that chain of events.

And the same is true of the other pillars where, again, the government doesn't link the alleged conduct. Apple's guidelines for super apps, Apple's decision not to offer SMS capability to third-party messaging apps, Apple's design of its payment infrastructure, and access iPhone's NCF radio, et cetera, to consumer's smartphone purchasing behavior, which is the government's alleged harm in the smartphone markets.

There is a particularly instructive decision from the Federal Circuit, *Princo v. ITC.* Now, that decision involved the patent misuse doctrine, which obviously is a defense to patent infringement. But in that defense, the infringer argues that the patent owner has impermissibly broadened the physical or temporal scope of a patent and has done so in a manner that has anticompetitive effects. And so anticompetitive effects are an element of that defense, just like in a Section 2 case.

Now, the *Princo* case concerned two different types of patented technology for CDs. One was called Orange Book and one was called Lagadec. Princo had licensed the Orange Book technology. It stopped paying licensing fees. And it faced a patent infringement lawsuit. And in defense, it asserted a patent misuse defense. And it said the license holder had impermissibly tied essential and nonessential patents in its license agreement, and that had prevented the less popular Lagadec technology from competing effectively. And the Federal Circuit rejected that theory of anticompetitive effects. We

put the language at slide 17.

The Court first noted citing *Microsoft*, that suppression of nascent threats can be construed as anticompetitive behavior under certain circumstances, but that the plaintiff still had the burden to show that the hypothesized agreement, that was the challenged conduct in that case, had an actual adverse effect on competition in the relevant market.

And the Court then said it wasn't enough that there was some speculative possibility that that other technology could have overcome the barriers to technical feasibility and commercial success and become the basis for competing disc technology and Princo's failure to show otherwise, quote, wholly undermined, end quote, its contention that the agreement had anticompetitive effects.

Now, this is a pleading stage problem. Courts in this district have dismissed cases where the complaint does not plausibly plead how the challenged conduct affected competition in the allegedly monopolized market. So for example, in the *IDT* case, the theory was that commercial landlords' restrictions on telecom companies' access to their buildings was harming competition in the market for telecom services.

Judge Greenaway dismissed the plaintiff's claims because they had, quote, not alleged any facts to permit the Court to find that a restraint in the market for building access has resulted in a restraint in the product market for

telecommunication services. And that's this case, too.

The government doesn't have any facts showing that Apple's conduct, with respect to apps or digital wallets or smartwatches, has actually produced the alleged harms in the smartphone market.

And then in the *Miller Industries* case just last year, Judge Hillman confronted a series of allegations about alleged harm to competition in the market for rotating wreckers, which is tow trucks, essentially. And he concluded on a motion to dismiss that the counterclaim plaintiff had not plausibly alleged that the alleged anticompetitive conduct has effected the price of rotating wreckers, restricted the output of the product, or impacted the quality of the product or the servicing of consumer needs. Again, the same is true here.

The government's conclusory references to higher prices, fewer choices, and reduced quality are not enough to show that Apple's challenged conduct has actually affected any smartphone prices, reduced any smartphone output, or decreased the quality of any phones.

Now, I do want to briefly return to what the legal standard is for showing anticompetitive effects.

The Supreme Court has been quite clear, this is slide 20, that the burden is on the government to show, quote, substantial anticompetitive effects in the relevant market. That is the *NCAA* decision at page 96.

The government says it just has to allege conduct that reasonably appears to be a significant contribution to maintaining monopoly power.

Now, that language comes from the *Microsoft* decision, but it comes from the portion of the *Microsoft* decision that's talking about Section 2's causation requirement, and that's not what we are talking about here.

Our argument is not about whether our conduct has caused us to maintain a smartphone monopoly. We are still at the conduct element. And we are looking at the portion of *Microsoft* that comes 20 pages earlier in the decision, it is on slide 21, where the Court said, To be condemned as exclusionary, a monopolist act must have an anticompetitive effect, which applies, no less, in a case brought by the government.

And, again, the Third Circuit echoed that requirement in *Dentsply* at page 187, where it said, The exclusionary conduct must have an anticompetitive effect. So there is no support for the government's lower standard.

But, again, it doesn't matter what the test is for effects. The government's claims fail because without a factual link between the conduct that's challenged and smartphone purchasing behavior, the government hasn't plausibly alleged either actual adverse effects or that Apple's conduct significantly contributed to its maintenance of any smartphone

monopoly.

The government also argues that the Court has to assess the effects from each challenge aspect of Apple's conduct cumulatively.

Now, under the Third Circuit's *un banc* decision in *LePage's*, which the government actually doesn't even cite on this point, it is clear that Courts aggregate the effects of conduct only after concluding that the conduct is exclusionary, which means that if the Court concludes that Apple's conduct is protected as a matter of law under refusal to deal principles, that conduct is not properly aggregated to consider effects and that is entirely consistent with the Fourth Circuit's nonbinding decision that the government relies on in *Duke Energy* where the Court explained that zero plus zero still equals zero.

But even if the Court does consider the effects cumulatively, it doesn't fix the government's pleading failure.

Ultimately, the government's theory is that if not for Apple's conduct with respect to five discreet product design decisions, some cross-platform technologies might exist or might be better.

Whether you take that separately or together, that theory depends on speculation about what third-party developers would do and then more speculation about how smartphone consumers would respond to that behavior.

And there are no well-pleaded facts from which the Court can actually infer that third parties or consumers would act like the government hypothesizes. And as a result, the government has failed to plead anticompetitive effects from Apple's conduct in a smartphone market, which is an independent basis for dismissal of the complaint in its entirety.

There is another case dispositive flaw with the government's complaint. And it is that the government has not plausibly alleged that Apple has monopoly power in either the U.S. smartphone or the performance smartphone markets.

So one way, of course, to establish monopoly power is by direct evidence. The Third Circuit has said in the *Mylan* decision, you need super competitive prices and restricted output, and it's extremely rare.

And here, at page 18 of their opposition, the government has disclaimed any argument that Apple charges super competitive prices. I put that quote on slide 18.

Now, that precludes a direct evidence case at a minimum. The government says its allegations that Apple's conduct could only be rational if it knew it had monopoly power and that Apple has higher profit margins than its rivals are enough to plead direct evidence.

No Court has ever endorsed that theory.

The government relies on *Dentsply* and *Microsoft*, but both of those cases required additional evidence of monopoly

power that are not alleged here. In *Dentsply*, the Court found that the defendant's profit margins had been growing over the years; that's at page 191 of the decision. The government doesn't allege that here.

Dentsply and *Microsoft* both considered evidence that the defendants could set their prices without considering rivals' prices, which the government, again, does not allege here.

And so, none of the government's cases support the suggestion that this Court can disregard the Third Circuit's clear holding in the *Mylan* decision that super competitive prices are necessary to allege direct evidence of monopoly power.

So I think at a minimum the direct evidence theory has to go.

The government has also not plausibly alleged indirect evidence of Apple's monopoly power, which is generally based on a combination of market share and barriers to entry.

So the government alleges Apple has a market share of 65 percent when you look at all smartphones or 7 percent when you look at performance smartphone. Now, those numbers rest on quite dubious calculations. They limit the market to the U.S., when we know that smartphone competition is global. They calculate share based on revenue, rather than units. But we except those numbers as pled for the purposes of the motion to dismiss. And even taking the higher, the 70 percent number,

that is insufficient to plead monopoly power in these circumstances.

The Supreme Court has never found monopoly power less than 75 percent market share. We are not saying that a lower market share forecloses a finding of monopoly power, but as the Fourth Circuit said it does weigh heavily against such a finding.

In order for a smaller market share to be sufficient, the government would have to allege additional factors indicating monopoly power that aren't present here. And the Third Circuit has told us in *Dentsply* and in *FTC v. AbbVie* what those other factors are. Things like the size and strength of competing firms, freedom of entry, pricing trends and practices of the industry, ability of consumers to substitute comparable goods and consumer demand.

Now, in *Dentsply*, the defendant had a persistently high market share, between 75 percent and 80 percent, and it had endured for over ten years. In *AbbVie*, the defendant had a market share that ranged from over 60 percent to 71 percent where no other competitor had even 10 percent of the market. Those other factors that supported a finding of monopoly power in *Dentsply* and *AbbVie* are not alleged to be present here. And they would be implausible had they been alleged given the complaint's own allegations at paragraphs 155 and 186 about the strength of Apple's major competitors, like Samsung and Google.

As you can see on slide 27, a finding of monopoly power at the government's alleged market share, without more, without any of those other factors, would quite literally be unprecedented.

The government's lead case, *Microsoft*, involved 95 percent of a global market.

Dentsply, like I said, had a market share of 75 to 80 percent.

And *AbbVie* found over 60 to 71 percent sufficient only because there was no other competitor who even got to 10 percent.

The government's own allegations in this case about the presence of major competitors, like Samsung and Google, make their allegations of monopoly power even less plausible.

The Third Circuit has recognized in the *Columbia Metal Culvert* decision at page 27 that the presence of powerful competitors is compelling evidence of countervailing power, which would preclude monopolization.

And going to the second part of the indirect theory of monopoly power, the government has not plausibly alleged that Samsung or Google can't expand their own offerings to compete with Apple.

They focus on barriers to new entrance and smaller rivals, but Samsung and Google's ability to innovate and increase their own smartphone output prevent Apple from setting

super competitive prices or restricting smartphone sales; and that makes the government's conclusory allegations about barriers to entry more implausible.

And so for those reasons, the government has failed to plausibly plead monopoly power, whether by direct or indirect evidence, which also requires dismissal of their complaint in its entirety.

Now, the plaintiff States and their claims should be dismissed for the independent reason that they don't have Article III standing, either in their direct sovereign capacity or in their parens patriae capacities.

In order to have standing in their sovereign capacities, the States must allege, quote, a tangible interference with their authority to regulate or enforce its laws. That comes from the *Harrison* decision from the Fifth Circuit just last year.

And *Harrison* made clear that enforcement of antitrust laws is not itself a tangible interference with a State's ability to enforce its laws sufficient to justify standing. There, the Fifth Circuit clearly held -- this is at page 770 -- that a State's interest in enforcing state and federal laws was not itself sufficient to confer standing as long as the State was not, quote, hindered from enforcing its laws directly.

The Court went on to say that sovereign injuries conventionally arise when a State has enacted a law, enforced

against a resident; and the resident has refused to comply. Then and only then, the Court said, it would seem, does a sovereign sustain a cognizable injury at least when it comes to enforceable public rights, but, the Court went on to say, someone violating a law does not by itself injure the government in an Article III way. Only actual or threatened interference with its authority does.

This case is not a situation like the one contemplated by the Fifth Circuit. There is no allegation that Apple is interfering in any way with the State's abilities to enforce their own laws or refusing to comply with an enforcement order. So the States don't have standing to sue in their sovereign capacity.

They also don't have standing to sue under the doctrine of parens patriae, which the Supreme Court made clear in a snap decision, does not involve the States stepping in to represent to interests of particular citizens, who for whatever reason can't represent themselves.

The Supreme Court made clear -- this is slide 33, it is page 607 of the decision -- that for the States to have a quasi-sovereign interest sufficient to justify parens patriae standing, they must allege some harm to the State itself that is separate from the interest of particular private parties.

But the relevant paragraphs of the complaint here, which are 192 and 193, only say vaguely that the States are bringing

claims to, quote, protect the economic wellbeing of their States and residence. The States' allegations of inflated smartphone prices are entirely derivative of the States' residents' own claims.

If the Court want any further confirmation that the Court -- the States are just trying to enforce private economic interests, the Court doesn't have to look any further than the many class actions advancing the same claims that are already pending in this Court.

That is exactly the situation the Supreme Court was describing when it went on to say that, quote, if nothing more is involved; i.e., if the state is only a nominal party without a real interest of its own, then it will not have standing under the parens patriae doctrine.

So because the plaintiff States lack standing in their sovereign and quasi-sovereign capacities, that provides an independent basis for dismissal of the plaintiffs and their corresponding State claims.

One final thing I would like to address.

We, obviously, believe that this case should be dismissed in its entirety, but if the Court is inclined to let it proceed at all, the allegations in paragraphs 119 to 125 and 136 to 140 should be dismissed for failure to satisfy Rule 8. And to illustrate why I think it is helpful to start with what the government actually alleges is Apple's anticompetitive

conduct.

So from paragraphs 52 to 118, the complaint alleges that Apple has taken unlawful conduct in five areas: Super apps, streaming games, messages, smartwatches, and digital wallets. Those five areas are clearly the focus of the government's complaint.

Now, those conduct allegations fail to state a claim for the many reasons we've talked about, but they do contain the factual support that Rule 8 requires. They walk through the particular technology, product, or service that the government is challenging.

They describe the purported restriction or conduct that Apple engaged in that the government believes harmed competition.

So let's just take super apps as an example. At paragraph 61, the government defines and describes what a super app is. At paragraph 62 the government describes the purported harm to users if super apps are restricted. At paragraph 63 and 64, the government explains how increased prevalence of super apps would reduce reliance on iPhone. And then at paragraph 67 to 70 the government describes the restrictions that it thinks Apple put on super apps requiring apps to display mini programs using the flat text-only list, banning the display of certain icons or tiles and blocking mini programs from accessing certain APIs.

Now, those allegations -- again, they are flawed for other reasons, but they do give Apple fair notice of what the government's claim is and the grounds upon which it rests.

But then the government says those allegations are just five examples of a much broader monopoly playbook. And so they want to pull into this case numerous other aspects of Apple's business that stretch far beyond those areas. And that is where the conclusory allegations in 119 to 125 and 136 to 140 come in.

So let me start with 119 to 125.

As you can see, on slide 35, those paragraphs contain references to over a dozen other products and services where the government says Apple used a similar playbook to build and maintain its smartphone monopoly.

But the government does not have any factual support for what Apple did or how it harmed smartphone competition.

So what I have done on slide 36 is for each playbook allegation, I listed just some of what is missing. I will just highlight a few examples.

The government alleges Apple underlined third-party location trackable devices that fully function across platforms. There is no explain in the complaint of how Apple purportedly undermined those devices or any alleged harm that conduct caused.

The government alleges that protocols Apple placed

around new eSIM technology may introduce additional friction for any user who wants to transition from an iPhone to a different phone while keeping the same phone number. The complaint doesn't identify what the problematic protocols are. It doesn't explain how they might introduce additional friction or even what that friction is.

Last example, the complaint says Apple uses restrictions in sales channels to impede the sale and distribution of rival smartphones, but the government doesn't explain what are the sales channels that Apple purportedly restricts or how Apple restricts them, let alone how any of that conduct affected smartphone competition.

Then we get to 136 to 140. Those have allegations about conduct Apple could take in the future, that if possible, are even more threadbare than the playbook allegations I just walked through. It is at slide 37.

At paragraph 137 of this complaint, the government says Apple has countless products and services, AirPods, iPads, Music, Apple TV, Photos, Maps, iTunes, CarPlay, AirDrop, Apple Card and Cash, which, quote, provide future avenues for Apple to engage in anticompetitive conduct and the ability to circumvent remedies.

There are no facts in the government's complaint about what Apple is allegedly doing or might do or how that unspecified conduct might affect competition.

As just one example, I think the government's overreach here is particularly stark where it alleges in paragraph 138 that Apple's conduct, quote, affects the flow of speech. The government says with no factual support that Apple is exercising its role as a TV and movie producer to, quote, control content.

There are no facts in the complaint, no allegations of what Apple is doing or how it might affect smartphone competition. Rule 8 requires more than that.

Rule 8 requires a pleading include a short and plain statement of the claim showing that the pleader is entitled to relief, and as the Supreme Court made clear in *Twombly* -- we put this language on 39 -- the purpose of that requirement is to give Apple fair notice of what the claim is and the grounds upon which the rests.

Under *Twombly*, the government's obligation to provide the grounds of its entitlement to relief requires more than labels and conclusions. It requires factual allegations that are enough to raise a right to relief above the speculative level.

The allegations in paragraph 119 to 125 and 136 to 140 fail under a straightforward application of that standard.

The government's only defense to this argument is to say that Rule 12(b)(6) only provides for dismissal of claim and not allegations. And so this Court can't dismiss just those

allegations even if it wanted to.

Well, that position has been rejected by this Court multiple times.

As we showed on slide 40 in *Stepan v. Pfizer*, your Honor explicitly rejected the plaintiff's argument that Rule 12(b)(6) doesn't allow for an entry of a piecemeal order that dismisses portions of claims. And your Honor went on in that case to limit the surviving claims to the well-pleaded allegations in the complaint.

In the *loanDepot.com* case, slide 41, Judge McNulty reached the same conclusion there actually in the context of Rule 8.

So like the government here, the plaintiff in *loanDepot.com* argued that the Court could, quote, only dismiss a count not individual allegations within a count. And that as long as a count includes one or more legitimate claims, it must be upheld as a whole set, and its allegations should not be split off and analyzed separately.

Judge McNulty rejected what he called the "all or nothing approach." He explained that Courts in this circuit have routinely dismissed subtheories contained within a claim while allowing other subtheories to survive. That is at page 235 of that decision. He made clear that he, quote, did not agree that bundling of good and bad claims should shield inadequate allegations from scrutiny and permit them to go

forward despite the pleading standards of Rule 8. And he said, in the appropriate case, I will exercise my discretion to dismiss severable components of a single count. And he went on in that case to dismiss portions of claims that relied on allegations that lacked the factual specificity and plausibility required to survive a motion to dismiss.

The government is trying to transform this case into something that it didn't plead, which is a far-reaching suit about the entirety of Apple's business.

The government had four and a half years to investigate its case. And after all of that time, it has come up with no facts supporting its playbook and future conduct allegations.

In addition to violating Rule 8, allowing these deficient allegations to remain in the case will have significant consequences for discovery. It will permit the government to seek discovery from Apple and hundreds of third parties about dozens of products and services with no understanding of how they are relevant to the claims at issue in this case.

Twombly makes clear this Court can and should prevent that far-reaching and unnecessary discovery. That is why the Supreme Court said there at page 558, a District Court must retain the power to insist upon some specificity and pleading before allowing a potentially massive factual controversy to proceed.

And that's exactly what we are asking the Court to do here.

In conclusion, the government's case is foreclosed on multiple grounds by long-standing antitrust law and by basic pleading principles.

So, first, we would ask that the Court conclude that the refusal to deal framework articulated in cases like *Trinko*, *LinkLine*, *Novell*, and *Meta* applies here and dismiss the government's complaint in its entirety because the government has not pleaded the requirements of the sole exception to the rule that a company is not required to deal; and, therefore, has failed to allege the exclusionary conduct element of a Section 2 claim.

Alternatively, if the Court concludes the rule of reason balancing test applies instead of refusal to deal, we ask that the Court find that the government still has not plausibly alleged the exclusionary conduct element because it has failed to plead facts that link the challenge conduct to the alleged harm in the smartphone market and, therefore, has failed to adequately allege actual anticompetitive effects. That failure, too, requires dismissal of the government's case in its entirety.

If the Court disagrees with us on both of those questions, we ask the Court find that the government has failed to plausibly allege that Apple has monopoly power, whether by

direct or indirect evidence.

As a result, the government has failed to plausibly allege that the monopoly power element of a Section 2 claim has been met, which also requires dismissal of its entire complaint.

If the Court allows any portion of the government's case to continue, we have two independent arguments that would require dismissal of portions of the complaint.

First, we would ask that the Court conclude that the plaintiff states lack Article III standing to pursue their claims, which would require dismissal of the States as plaintiffs and the dismissal of the asserted state law claims.

Second, we would urge the Court to dismiss the cursory allegations in paragraphs 119 to 125 and 136 to 140 for failure to meet the basic pleading requirements of Rule 8 and *Twombly*.

Thank you, your Honor.

HON. JULIEN X. NEALS: Thank you, counsel.

MR. LASKEN: Would you like us to proceed right away, your Honor; or should we take a break?

HON. JULIEN X. NEALS: Did you want a few moments?

MR. LASKEN: That would be wonderful if it is convenient for the Court.

HON. JULIEN X. NEALS: That's fine.

With regard to the length of your argument, what do you anticipate?

I am just trying to think if we take a break; and then come and go straight through?

MR. LASKEN: Yes, your Honor.

I am to guess about an hour. There was a lot covered there.

HON. JULIEN X. NEALS: What is the parties' desire? Would we like to take more of a substantial break or just push through? The Court is fine either way.

MR. PRIMIS: We are amenable to a short break, and then come and make a final push to get through.

HON. JULIEN X. NEALS: Great. It is 12:48. We will reconvene at 1 o'clock.

MR. PRIMIS: Thank you.

MR. LASKEN: Great. Thank you, your Honor.

THE COURTROOM DEPUTY: All rise.

(Recess taken 12:48 p.m. to 1:06 p.m.)

THE COURTROOM DEPUTY: All rise.

MR. LASKEN: Good afternoon, Judge Neals. May it please the Court.

Jonathan Lasken, counsel for the United States.

Your Honor, Apple is litigating against a ghost complaint based on rules of law that don't exist.

The number of cases that we're going to talk about, and I will get to all of them, that say what I view as something different than how Apple reads them is quite large. And we

will get there, and we will talk about all of them.

But for now, the important point is that I want you to know what Apple can do under antitrust law and what it can't do.

Apple can compete on the merits, that is what it has the right to do.

What Apple can't do is use monopoly power to stop others from competing on the merits. Apple can't stop other companies from having good products. And it can't stop consumers from choosing them if they want to all to protect a lucrative smartphone monopoly. Apple can't selectively enforce contractual restrictions against developers like App Review rules or APIs to hobble their products. And as we allege, the purpose of that hobbling is to stop anything that might threaten Apple's smartphone monopoly.

The complaint sets that forth in substantial detail. You know, there was a reference to a four-and-a-half year investigation. Right? Substantial detail that is well supported by facts from that investigation and often directly quoted from Apple. It is a straightforward Section 2 violation that should easily survive a motion to dismiss.

Now, understanding that the complaint is drafted as strong, and it pleads a claim, Apple sets up a number of straw men knock down.

First, Apple tried to redraft our complaint to suggest

we are challenging product designs or force them to make products for android. They didn't specifically raise that today, but we're going to talk about that because that is all over their briefing, and it is very important. Part of the reason it is important is because product designs under *Mylan* are not assessed as refusals to deal. So even Apple's own argument as to how you should look at the conduct under binding Third Circuit precedent places it outside of that claim.

Apple tries to redraft our complaint to suggest we are pursuing a refusal to deal with rival smartphone claim. I just mentioned that to you, we are not pursuing that claim.

Nor is this case about Apple's proprietary technology. That argument is like saying someone who makes a TV gets to tell producers what to put in TV shows just because it shows up on a TV screen. None of those things are part of the complaint we filed.

Here is how Apple's conduct gets examined, your Honor. Apple's conduct has to be examined in context. As with anything, actions that are not per se illegal become illegal if you do them for an illegal purpose.

Look, anyone can buy a baseball bat. That is what *Microsoft* talks about. You can use it to play baseball. You can use it to break a pinata if you want to. But if you use it to break your neighbor's window, it becomes illegal. If you use it to hurt someone, it becomes illegal. The same is true

here.

Apple is advancing broad claims that it can do anything it wants with an API. It can have any rule it wants. That's not how antitrust law works. And it is not true if you use those things to harm competition.

So APIs aren't the problem. It is Apple's selective use of them to degrade products and block innovation is the problem.

And the question whether that's happening, whether Apple is using APIs for that purpose, that is a fact question for this Court to decide based on evidence after discovery.

Now, Apple's argument also rises and falls on a misreading of *Colgate*. So I want to go there.

I want to start at -- I didn't bring a slide deck, your Honor, but we can use theirs. So let's go to page 4 of their slide deck.

Now, their the first quote -- their first quote, which comes from *Trinko*, that is a quote from *Colgate*, but it is only part of the quote. So let's talk about *Colgate*.

So here is the first thing I want you to know about *Colgate*. *Colgate* is not a refusal to deal with rivals case, it is outside of that doctrine. It is about something called resale price maintenance. And what that is is when a manufacturer essentially forces its distributors to charge a certain price for their products; sometimes in antitrust law,

we call that vertical price fixing.

So it is about dealing with distributors, that is kind of like Apple's relationship with developers.

Now, more importantly, Apple flipped the meaning of *Colgate* on its head by omitting a key part of that quote. Read in full, *Colgate* says dealing with third parties to create or maintain a monopoly, that is illegal. There is reason Apple had to change the word "rivals" in all of the cases it is relying on to "third parties" to get to where it needed to go.

Here is what it says, quote, in the absence of any purpose to create or maintain a monopoly. That is what Apple left out.

Let me read that again. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long-recognized right of the trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as the parties with whom he will deal. That is what we pleaded.

Apple placed restrictions on developers and users to maintain and create a smartphone monopoly.

Under *Colgate*, the very thing Apple admits it did, the very thing Apple tells you is legal is illegal. It is not protected conduct, and it has been illegal in this country since at least 1919.

Now, *Colgate* is clear on its face, but *Lorain Journal*

confirms that point.

Lorain Journal was a case like this one where monopolist tried to claim an unfettered right to deal, just like in *Colgate*. That claim was rejected in *Lorain Journal*.

This is what the Supreme Court said. Quote, the word "right" is one of the more deceptive of pitfalls. It is so easy to slip from a qualified meaning under the premise to an unqualified one in the conclusion.

That is where Apple is right now, unqualified right to deal.

Most rights are qualified. The right claim by the publisher and the right claim by Apple today is neither absolute nor exempt from regulation. It's exercise as a purposeful means of monopolizing interstate commerce is prohibited by the Sherman Act. That is at page 155 of the opinion.

That is the law, your Honor. I will get to the refusal to deal with rivals cases later. I am not going to not address *Trinko*, but that is the law.

And not to beat a dead horse, but that is what we have alleged. Apple has entered into deals with third parties as a purposeful mean s of monopolizing smartphone markets. It is illegal.

Now, your Honor, Apple also is operating outside of the motion to dismiss standard. Apple is continually putting facts

at issue that aren't yet in evidence before this Court.

For example, you heard Apple offer justifications like its need to balance privacy and security against other restrictions to justify its conduct. Look, if they can prove that at trial, that very well could be a defense. But they are not appropriate at this stage as a matter of law. Those are the step 2 justifications that your Honor is aware of from the briefs.

And, ultimately, as a matter of fact, these claims are going to be disputed by third-party witnesses, by Apple's own documents, by other evidence, by all of those things that we learned in the four-year investigation. They will all be disputed. And your Honor will have a full record, and you can use that record to decide what really is going on. That is what discovery is for. That's what trials are for.

For now what matters is what we pleaded, and the complaint's allegations have to be accepted as true. And over and over, Apple's only answer to that is to challenge the facts.

Look, at the heart of this motion to dismiss is a dramatic effort to expand refusal to deal with rivals law to give immunity to plainly anticompetitive conduct and substantive defense that Apple hasn't undertaken that conduct.

They're wrong on the law and their defense has a time and a place, and that place is trial after discovery and on a

full record. Not today. And that is why we will ask at the end that this case move forward in the discovery as soon as practical, of course, consistent with the Court's schedule and preferences.

So let's turn to the complaint and what it actually pleads. It has two claims: Monopolization and attempted monopolization. I am going to address the monopolization first and then turn to attempted monopolization.

To plead a monopolization claim, you have to plead two things; monopoly power and anticompetitive conduct to get and hold onto it.

Look, monopoly power isn't 100 percent market share. Courts are clear on that. Monopoly power is just the ability to control prices or quality, to exclude competition -- or exclude competition in a given market without losing significant customers.

And there are two ways to get there, you can plead it through market shares; or you can plead it through what's called direct evidence, which is basically a monopolist acting like a monopolist.

We pleaded both of those things. We pleaded the belt, that is the market share. We pleaded the suspenders, that is all of the facts that show monopoly power directly and the inferential facts that support shares.

Now, before I get into the details, though, I want us to

all take a step back.

There is nothing illegal about being a monopoly. Nothing. The question whether Apple has monopoly power is just a question of how much power Apple actually has.

Apple is the richest company in the world. It charges a 30 percent tax in perpetuity when a consumer uses someone else's product on the iPhone. Not a product Apple developed. Not a product Apple maintains. None of those things.

And we are here today based on the idea that it is not plausible that it has monopoly power, but instead it is at the mercy of supposed global behemoths who are a fraction of its size. The Court is allowed to use common sense, your Honor, that is in the case law.

Now, in any event, we wouldn't leave it there. We pleaded all of the things that are necessary to support the claim directly under the law.

So let's start with what the law calls indirect evidence, that is shares route. For this you need a dominant share of any properly defined market that has entry barriers.

Now, Apple has conceded that the sale of premium smartphone and smartphones generally in the United States are relevant markets for the purpose of this motion. So that means we are looking at shares and barriers in those markets. Any argument about things in other markets, any argument about why they are not market, those are not relevant arguments given

that concession.

The complaint pleads that Apple has more than 70 and 65 percent shares in those markets respectively; that is in paragraph 181. And that those markets are protected by significant barriers to entry and expansion; those are in paragraphs 183 to 186. Those are all allegations that have to be accepted as true in this stage.

Now my colleague talked a lot about shares and what the right shares is, but never told you what the actual rule is in Third Circuit, which has been explicitly articulated multiple times.

The shares are more than the 55 percent required by *Dentsply*; that is the rule. There is a number in Third Circuit opinions and if you are significantly more than that number, you meet the shares.

And it is more than shares in decisions like *AbbVie* and *Houser* where the shares were 60 to 71 percent and 66 to 71 percent.

Now, your Honor, they referenced decisions that were decided at summary judgment or trial. If they want to prove that Samsung and Google can strain them, if that is the argument, that is not a motion to dismiss argument. That is an argument that they can bring forward evidence of to try to undermine the shares. But the shares are what they are. And under the law that makes them a monopolist, at least for now.

Now, the entry barriers are also pleaded in detail. Apple raised some arguments about entry barriers in its brief. I didn't actually hear them today, but they left a number completely uncontested. The uncontested barriers include the difficulty in acquiring chips and special glass, the need for regulatory approval, and restrictions on carriers' ability to sell the phones; those are in paragraphs 183 to 185.

And we know the barriers are high. Amazon and Microsoft tried to enter the markets and they failed, that is a sign that the barriers are high; that is, in paragraphs 186.

Now, these pleadings establish monopoly power under Third Circuit precedents like *Broadcom* and *Dentsply*. Nothing said today here suggests otherwise. That is enough. The Court can end its inquiry right there.

But I mentioned suspenders. Let's talk about those. Those are the things you heard described as, well, maybe if this is true or it is not true, that would undermine market pow er. These are all things that as *Dentsply* tells you become relevant if you are talking about monopoly power at lower shares. We are not talking about monopoly power at lower shares, but we pleaded them anyway.

We pleaded the durability of Apple's share. That is at paragraph 182. I think it was said that we didn't plead that they had durable share for ten years. In fact, we explicitly pleaded that in paragraph 182, that their share has been

durable for the last ten years. We called it a decade.

Pricing trends in the industry, the inability of customers to switch to other smartphones, and we also pleaded that Apple has high margins. Again, what we heard was that we didn't plead that. It is expressly pleaded in the complaint. These are paragraphs 182, 183, 188, 189.

This motion is not directed at the complaint that was filed. All of those pleadings have to be accepted as true. And they are never actually contested anyway other than to say that they are not there. We can look at the complaint and see if they are there. And they further establish monopoly power.

Your Honor, my colleague discussed 75 percent as if it was a relevant or important threshold. It is not. It is not relevant in this circuit. The Third Circuit has decided that 55 percent is presumptively enough. It is not relevant in any other circuit either. There is not a single circuit in this country that requires you to plead 75 percent or more market share to plead monopoly power. And that case, *Cologne*, the Fourth Circuit case, it also doesn't require that. If you read the case, the case says the Court correctly denied a motion to dismiss where the pleadings had 70 percent market power -- sorry. Market share. So that decision itself doesn't support the argument.

Look, Apple hasn't cited any cases dismissing a complaint at 65 and 70 percent share. They're not 70 percent

share. They haven't cited a single one. They say, Hey, those cases are different, but they can't point you to any because that is not how it works.

Now, I mentioned Samsung and Google. You heard a lot about the idea that Samsung and Google are constraining. You've seen that in the briefs. The idea here, I guess, is that Samsung and Google are Goliaths and Apple is a David who can't afford a misstep.

The complaint pleads otherwise, and it has to be accepted as true. It pleads specifically that Apple is engaged in illegal conduct that would prevent those companies from increasing their output.

Increasing output doesn't literally mean you can make an additional phone. Making a phone doesn't help. You have to sell it. Right? It pleads repeatedly that they have done things that make it hard for people to switch from the iPhone to other phones. That is a pleading that those companies can't discipline Apple.

And we also plead structural barriers which include the switching costs that would exist even if they didn't do that.

And we pleaded statistics from the investigation. 98 percent of people who own an iPhone buy another iPhone. That is in paragraphs 183 to 186. Those allegations have to be accepted as true. And when you accept them as true, the rivals aren't constraining Apple.

Again, if they have a dispute, if they have facts they want to bring, there is a time for that. But it is not a motion to dismiss.

Now, look, there was some, I think, aspersion -- I'm not sure what to call it -- to the other markets. I want to address that briefly.

There was a claim in the brief that the performance, smartphone market is divorced from reality. As we pleaded in the complaint, this is how businesses in the industry, including Apple, conduct their own business.

So the facts will come in, and the Court can decide that one for itself. It is not contested today so it doesn't matter, but I wanted to address it.

And you heard a discussion about the global market, the phones are competing globally.

Now, if you look at the brief, Apple says its global market share is 15 percent. If Apple's global market share is 15 percent, I can't think of a better argument for why the United States is more representative of Apple's power in United States than the global market.

Beyond that, the complaint pleads all of the relevant facts for a geographic market, like different distribution channels, pricing, and regulatory frameworks. Those are in paragraphs 176 to 178. And the question, the market definition question, to be clear, is not if there is any competition that

occurs at a global level. It is if prices went up a little bit in the United States, would we all leave the United States to go buy iPhones from other countries to get them for less. That is the question that actually defines market in this case, your Honor. The fact that there might be some competition somewhere doesn't mean the United States isn't a market.

Apple also talked about direct evidence. Direct evidence is basically evidence that the defendant can act like a monopolist. Things like they are not worrying about the price of other products when they set their own. They are not worrying about the quality of other products when they decide their own. The complaint pleads that Apple can and does behave this way. It throttles third-party technologies with little concern for whether competitors might adopt them, and no fear of losing their share to rivals, who, if were not a monopolist, would incorporate those technologies and take share away from Apple.

It imposes terms on carriers that impede them from distributing the phones of others; that is in paragraph 188. That is similar evidence to the direct evidence that the Third Circuit relied on in *Dentsply* and that other Courts relied on in cases like *Microsoft* and *Remax*. That is enough, too. That is a second way we pleaded monopoly power.

Apple tried to reference *Dentsply* for this idea that the only way to plead monopoly power is through high prices.

That is exactly the opposite of what *Dentsply* says. I would read it to you, but I will just tell you the page. On page 191 of the opinion, the Third Circuit explicitly says that the failure to charge a monopoly price provides no succor to the monopolist. You can violate antitrust law without charging a monopoly price. You can be a monopolist without charging a monopoly price.

Now, having said that, we are not saying that Apple is not charging a monopoly price. We are just saying we didn't need to rely on it for the purposes of this motion. When we plead that they have high margins and other things, they are charging a monopoly price. What we were just doing is saying that this is one dispute that just doesn't need to be addressed. There's so many other ways here that we have pleaded monopoly power, we just should look at the other ways.

So I just want to be clear. We are not saying they are not charging a monopoly price. We are just saying for the purposes of this motion we don't need to get there.

Now, as I mentioned, the cases that were discussed today were not motion to dismiss cases. They are cases decided on a full, factual record.

In Apple's brief it cites a different case, the *LA Land* case. So I do want to address that.

LA Land held, also after trial, by the way, that certain actions were not direct proof because a nonmonopolist could do

them. It wasn't because they weren't prices. So, for example, you don't have to be a monopolist to prepare a false market survey to stifle a competitor. That is anticompetitive conduct, but you don't have to be a monopolist to do it. Right? That's at page 1427 of the opinion.

So, your Honor, I want to pause there because I am going to turn to anticompetitive conduct now, but if there is anything else I can address for you, I would be more than happy to do it or answer any questions.

HON. JULIEN X. NEALS: No, counsel. Please proceed.

MR. LASKEN: Okay.

So the second element is anticompetitive conduct.

Anticompetitive conduct is just conduct that contributes to a monopolist keeping or maintaining its monopoly by something other than competition on the merits.

You also see there short-handed as exclusionary conduct.

Apple raises two arguments about this element, and they both should fail.

First Apple asserts that the complaint's allegations of harm to smartphone competition are implausible. Plausibility means, as the Court knows, a reasonable belief that discovery will yield facts supporting a violation. That is plausibility. The complaint pleads the challenge connection based on Apple's own words and assessments of that connection as well as other well-pled facts. That is more than enough at this stage.

And, second, Apple asked the Court to dismiss the case based on a misunderstanding of refusal to deal with rivals law. That argument fails many times over. First, a refusal to deal with rivals claim is one theory of anticompetitive harm that a plaintiff can assert. It doesn't grant Apple the right to deal with third parties on anticompetitive terms.

Second, the complaint does not assert a refusal to deal with rivals claim. Apple is not allowed to rewrite the complaint. Refusal to deal with rivals cases allege that a monopolist is harming competition by failing to cooperate with its rivals in the monopolized market. The complaint isn't alleging that Apple harmed competition by failing to cooperate with smartphone rivals like Samsung and Google.

Apple's characterization of the conduct itself shows you it can't get there. More than a dozen times in its brief -- and its very clear on the first page of its reply brief -- it claims, We are challenging its unilateral product design decisions. Product design decision s under the *Mylan* case and other cases in other circuits are assessed under the general test -- now, again, we don't agree that it is a product design case, but that tells you something, that even Apple can't find a way to describe the conduct that would get it to the refusal to deal.

And, third, even if the complaint were assessed under refusal to deal with rivals theory, the allegations in the

complaint are sufficient to state that claim.

Now I want to start with where my colleague ended, which is the idea that all of the antitrust law falls into boxes. And he turned to *LePage's* for that. Here is what *LePage's* says about Section 2.

Anticompetitive conduct can come in too many forms and is too dependent on context for any Court or commentary to have enumerated its varieties. So there is not a list of boxes. And the way Section 2 works is not -- there is a list of boxes, and if you fall in one, it's illegal and otherwise it is legal. That is not how Section 2 works.

Also, in *LePage's*, this section is in sweeping language suggesting the breadth of its coverage -- that is what the Third Circuit view, Section 2 has. Then it ends by describing Section 2 this way. Section 2 is the provision of the antitrust laws designed to curb the excess of monopolists and near monopolists. It is the equivalent in our economic sphere of the guarantees of free and unhampered elections in the political sphere. Just as democracy can thrive in a free political system unhindered by outside forces, so also could market capitalism survive only if those with market power are kept in check.

That is what the Third Circuit says Section 2 is about. It is not about protecting a monopolist's incentives to innovate or giving them wide berth to engage in anticompetitive

conduct just because it is included in a deal.

And to take that one step further, this exact argument was rejected by the Fourth Circuit in *Duke Energy* where the Court wrote, Section 2 focuses on anticompetitive conduct, not Court-made subcategories of that conduct. That is what the Court was just asked to do. Look only at the subcategories. See if it fits in one. If it doesn't, it must be legal. That flips Section 2 analysis on its head. That is at page 354 of that opinion.

Now, having cleared that up, I want to turn to a second thing to clear up. This case is not about whether App Review or private APIs are legal business practices in general. Antitrust cases don't decide issues at the macro level like that.

No Court has ever held that all conduct related to API or a platform rule is legal. They couldn't. It would conflict with black letter law.

Courts decide whether conduct is anticompetitive based on its context. That is what *LePage's* says. *LePage's* is the seminal decision in this Circuit, but they are in all of the others -- well, I shouldn't say all of the others. In many of the others.

Microsoft says it as one other example.

Context depends on facts on the ground. That is why you see Courts saying over and over again antitrust cases are fact

intensive. This case involves the use of APIs and App Review to undermine competition. Just like Apple has APIs, a normal person might have a baseball bat. I gave you the short version of this analogy. Now, I'm going to give you the long one because I can't get away from the bat.

Now, maybe they made that bat for themselves, a proprietary. They bought wood from a hardware store. It is not illegal. They can play basketball with the bat. It is not illegal. They can break the pinata with the bat. It is not illegal. But when they turn around and use it to break their neighbor's window or hit their neighbor, now it is illegal. It has nothing to do with who owns the bat. It has nothing to do with the fact that it is a bat. It is what you do that gives rise to the violation. And our complaint has over 70 pages of pleadings about context, context about where these restrictions came from, context about why Apple enacted them, context about what they actually did.

Now, I will turn to how that context states a claim.

Apple stopped competing on the merits when it selectively weaponized App Review and private APIs to undermine technologies that consumers would want to use with their phones but they also threatened Apple because it made it easier for consumers to choose a different phone. That is exactly what happened in *United States v. Microsoft*, taking actions in one market to protect the monopoly in another. Set the rules of

your platform to undermine products that work on your platform and others making easier to choose -- and making it easier for others to choose a platform on the merits. Undermine products like middleware.

And how does that break competition? It forces consumers to consider things other than the merits of the operating system -- or the phone here -- when they are trying to make their choice.

As the Court explained in *Microsoft*, quote, if a consumer could have access to the applications he desired, regardless of the operating system he uses, simply by installing a particular browser on his computer, then he would no longer feel compelled to select Windows in order to access those applications. He could choose an operating system other than Windows based on its quality and its price.

Phones have those type of features, too. We heard a lot about them at technology tutorial. They have chips. They have cameras. They have operating systems which have their own merits. And, of course, pricing.

But as we plead in detail, and even in Apple's own words, they placed obstacles in the way of people choosing phones based on those merits. So instead of choosing phones based on those features, people are choose phones to avoid dealing with those obstacles. They don't want to have to pay for a new watch when they switch their phone. They don't want

to have broken texting with their family and friends. They don't want the hassle of transferring a digital life.

And we pleaded in detail how Apple does this. how Apple uses its control over the iPhone in select instances to force developers to -- how to make decisions to design their products. How to make decisions to design their products in ways that hobble them or eliminate them entirely. And those allegations have to be accepted as true at this stage and that is the claim in *Microsoft*.

Now, Apple's only response to this claim is to say these allegations implausible.

The allegations in Apple's own words and in detailed pleadings. That is not implausible. Not close.

For example, the complaint pleads direct recognition by Apple that breaking text messaging impacts our phone choices. Paragraph 92 quotes Apple's CEO telling customers to buy an iPhone to compensate for broken text messaging between iPhones and Android phones. He didn't suggest downloading an alternative text messaging app. He didn't suggest changing a setting in iMessage, he said if you want to text your mom, buy her an iPhone. That is a direct connection by Apple in the ordinary course between those two things.

Paragraph 91 quotes Apple's senior vice president of software engineering calling broken text messaging, quote, an obstacle to iPhone families giving their kids Android phones.

Direct recognition in the ordinary course by Apple that broken text messaging effects phone choice.

For super apps, the complaint pleads the connection based on Apple's own assessment based on its own experience in another country where super app took hold; that is in paragraph 66.

For cloud games, the complaint quotes direct recognition, direct recognition by Apple employees that suppressing -- between cloud gaming and price competition on smartphone hardware. Direct connection. They didn't want to get in a fight over who has the cheapest hardware, so they suppressed cloud games; that is paragraph 71.

For wallets, the complaint pleads that -- pleads Apple's assessments that it can use wallets to protect its, quote, most important and successful business iPhone; paragraph 104. Again, direct connection by Apple in the ordinary course between these technologies and phone choice.

And Apple recognizes keeping the watch tied to the phone, that may, quote, help prevent iPhone users from switching; that is paragraph 98.

It is Apple's own assessment of its own business in the ordinary course that tells us these technologies are connected to phone choice. Pleading that in Apple's own words, that more than meets the plausibility standard. And if Apple's words weren't enough, we did plead the market facts, we did plead how

it effects your choices. Things like having to buy a new watch if you switch phones. It is literary more expensive to buy a different phone because you have to get rid of your Apple Watch and buy a different one. That is obviously going to effect someone's phone choice; that is in paragraph 96.

What more could we have pleaded about this?

Look, you can always ask for one more detail or one more allegation, but that is not the standard. Rule 8(a) requires a short and plain statement for grounds of relief. Case law requires that statement to be plausible and not conclusory. The 70 pages of detailed allegations, often in Apple's own words, they are very far beyond that.

Now, I want to talk about the pleadings of harms to developers and users. The harm that Apple did in those other areas to protect its smartphone monopoly.

So we just talked about the connection, but I want to talk about the harm in those other areas. And as best I can tell, Apple is not actually challenging those pleadings right now because, as I understand the argument, that we pleaded harm in the wrong markets, that would short of imply, right, that they agree that we pleaded it. Not that they are agreeing with them, to be clear, just that they agree that we pleaded it.

In any event, I want to go through them to complete the picture and so that we can also understand why they are not product design choices.

So here is a brief overview and I am just identifying the key ones. The complaint pleads that Apple made super apps nonviable in the United States by forcing them to incorporate painful user interfaces and preventing users from paying the developer for their work; that is in paragraph 69 to 70.

The complaint pleads that Apple made cloud gaming apps nonviable by forcing developers to design their products in ways that would make them difficult for users to use and costly for developers to produce; that's paragraph 76 to 78.

The complaint pleads that Apple made third-party text messaging apps worse by forcing them to design their apps without text-to-anyone functionality. As a result, consumers are forced to use iMessage as their primary text messaging app because the hassles associated with getting every new contact you need into the same text messaging app that you happen to use just make it infeasible to use those other apps as a primary messaging app; that is paragraphs 85 to 86.

The complaint pleads that Apple made third-part y digital wallets essentially nonviable by forcing developers to design them without Tap-to-Pay functionality; that is in paragraphs 111 to 117.

Again, that is not people choosing the Apple Wallet because it is better; they're using the Apple Wallet because Apple denied them any other choice through a restriction on third parties.

The complaint pleads that Apple made third-party smartwatches worse too. And we pleaded that by saying that they were prevented from being designed to properly respond to notifications or maintain a Bluetooth connection, but Apple lets its own watch do that.

So, again, people aren't buying the Apple watch because Apple made it better, even if we may all think that's what is going on. They are driven to the Apple Watch because Apple made other companies' watches worse; that is in paragraphs 100 to 103.

Now, as I mentioned in the briefing, Apple claims this is all about Apple's design choices, but that is plainly wrong if we just think about it.

Let's talk about the super apps. One of them prevents super apps from displaying items in a grid, rather than a flat list. That's not an Apple design decision.

How do you know that? When you open up an iPhone, you are going to see a beautiful grid of icons. So Apple has decided it is just fine to show a grid of icons on an iPhone. And, in fact, they apparently view that as the best way to display things on the iPhone because that is how they choose to do it themselves. They just made a different decision for third parties who wanted to make an app that they viewed as threatening. But Apple can't relabel a restraint as a product feature and declare it immune from antitrust scrutiny. The

Supreme Court already decide that in *Alston*.

And, your Honor, the point is even clearer when you recognize that these restrictions come from contract terms. Contract terms are not design decisions, that is not designing a product. They are contract terms.

Now, there is an idea that Apple changed everything and that was raised. And it is true Apple changed some rules shortly before the case was filed and while it has been pending.

As we noted at the tech tutorial, Apple retains numerous switches to flip. And in the case of the NFC chip, for example, the one that we heard about more recently, we understand that Apple actually has flipped those switches and we look forward to looking -- learning about that in discovery, but they that they have flipped other switches, despite making that API, that will continue to make digital wallets nonviable.

So that is, again, something, your Honor, we're going to deal with it after discovery because it happened after we filed, but that is a fact dispute. We are going to attempt to raise, I suppose, a fact dispute to this Court.

Now, beyond that, Apple can undo any changes made anyway. And it had those rules for years before the case was filed. And, by the way, ostensively because they were necessary for privacy and security.

So Apple, if you buy what they are saying, just changed

a bunch of rules voluntarily, not in response to litigation, that were necessary for privacy and security.

An, again, I don't know what's behind the curtain because we haven't had discovery, so I am not saying what is. I am just saying these were rules that were supposedly necessary for privacy and security.

And beyond that, your Honor, you heard Apple try to counter the complaint through its own factual narrative. That is, again, inappropriate at this stage.

Now, you heard this talked about when you heard the statement that Apple is balancing considerations about privacy, security, and user experience with decisions about what to restrict. Those are justifications for Apple's conduct. They are not relevant right now. They are factual defenses that Apple can present at trial.

The complaint only needs to plead the first step of burden shifting. But, your Honor, we pleaded the opposite. At this stage the complaint has to be taken as true. The complaint pleads that Apple deliberately and selectively degrades quality, privacy, and security for its users when it suits Apple's financial interests to do so; that is in paragraph 16.

In other words, for Apple, privacy and security is an elastic shield that stretches and contracts to serve its business interests. And we plead examples of how Apple's

conduct, the specific conduct here does that, in paragraphs 141 and 147, such as making users send unencrypted messages when they might otherwise not need to. For today, that is not only enough, it is more than enough.

And a final point, your Honor, when this does become an issue, as I told you before, this is not an issue that operates at a macro level. The question is whether the specific conduct that makes up the course of conduct is justified by privacy and security. This is not a challenge to Apple's overall business, no matter how much they want it to be.

Now, your Honor, we also heard about a lengthy causal chain; that is on slide 16 of the deck that you received.

This is Apple's factual theory for why we are wrong. This is a fact -- a fact defense being presented through a motion to dismiss.

Beyond that, your Honor, we don't have to plead all of these links; and we certainly don't have to prove them either. We have to plead that Apple and other participants made this connection. They traversed these links in the ordinary course. And we assume they understand their own businesses. That is enough to infer the connection.

Now, beyond that, this is also foreclosed as a matter of law requiring this type of proof.

As the *Microsoft* decision explains, if the defendants take actions that make the "but for" world uncertain, such as

how many people would adopt an app that Apple killed off, it is the defendant who must be made to -- quote, made to suffer the uncertain consequences of its own undesirable conduct; that is at page 79.

You can't eliminate competition and then say the Court or the plaintiffs couldn't exactly reconstruct what would have happened had they never eliminated competition. That is not our burden here.

Now, beyond that, Apple argues that we have to prove as part of these chains that prices would fall or exactly what competition would do if it was restored. That is not our burden either.

The claim here is about a loss of competition. If we prove that Apple lost competition -- or eliminated competition, we have proved the violation. We are not a private plaintiff seeking damages. We don't need to prove how much it cost us. That is where our proof ends.

Now, you heard a number of attempts to distinguish *Microsoft*. And those distinctions, at least as I heard them, they amount to an argument that Apple's conduct is lawful because it found different methods to break competition in the same manner.

Antitrust law is not so easily evaded. As I read to you from *LePage's*, Section 2 was designed to curb the excesses of monopolists and near monopolists. Minute formalistic details

about those excesses, they don't matter. Apple doesn't get to suppress competition so long as it does it in a different way from what happened in a prior case.

Regardless, it is not different. We heard some talk about setting the rules of the road for its platform. But Microsoft apparently was only engaged in exclusive dealing. That is just factually inaccurate. Microsoft's conduct included things like controlling the icons that could be used in Windows, Windows modifying the Start menu. None of these things are exclusive dealing terms. Right? They are things about what you can do in Windows with Windows. So that is just wrong.

You also heard Apple claimed the cases are different because Microsoft had a 95 percent share. Two points here. First, once monopoly power is established, the share doesn't matter. So different shares are going to be irrelevant anyway to the effects analysis, and that is what we are talking about in *Microsoft*. Either you are a monopolist or not. And if you are, then the question is going to be whether you are engaged on something other than competition on the merits.

Second, your Honor, the shares aren't actually that different. Microsoft share was only 95 percent in a market that excluded Macs. The market was called the market for, quote, Intel-compatible operating systems. That was the market. The analogy here would be something like a market for

phones with Apple silicon in them. I am pretty sure Apple's share of that market is a hundred percent.

Now, if you look at the opinion, there was a market that included Macs. And when you look at that, it dropped to 80 percent, pretty close to Apple's share here.

And what the DC Circuit said about that, it doesn't matter which market you look in, they are still a monopolist and it is still illegal.

Apple also gave some claims that their conduct is different because it is not an outright prohibition. That, I think, is the point about restraining companies like Netscape through third parties. Look, being clever about how you restrain competition, not saying out loud what you are doing, that doesn't somehow let you escape antitrust law. And I guess if you really drill down on this argument, the idea is if Microsoft had directly restrained Netscape by restraining it rather than using some sort of exclusive dealing with third parties, then somehow its conduct would become legal? Look, I mean, that's, I guess, a distinction, but it makes Apple's conduct actually worse. The idea that *Microsoft* did something indirectly that Apple did directly, that is not a distinction from Microsoft, your Honor. At the end of the day, antitrust law prohibits monopolists from suppressing competition on the merits. It doesn't matter if you do it directly or indirectly. It doesn't matter if you say it out loud while you are doing

it. It doesn't matter if you specifically reference a rival in the contract that does it. It prohibits a suppression of competition on the merits. That is what it prohibits.

And the conduct alleged here is the same. It is about interfering with third-party products that make it easier to switch platforms. For example, Apple forced super apps to design their products in ways that made them less attractive to users and prevented them from getting paid. That is interference with a third-party product that users would have wanted that would have allowed for more competition on the merits among phones. That is exactly the same as in *Microsoft* when Microsoft interfered with Netscape to drive people into Internet Explorer -- by the way, rivals. That was not mentioned -- rivals in an adjacent market. That case was not a refusal to deal case.

Now, I think there was a suggestion that maybe *Microsoft* has been overruled or that *Microsoft* somehow whiffed in its defense and just failed to raise refusal to deal, but it really was a refusal to deal case.

Your Honor, *Microsoft* has been cited hundreds of times including repeatedly by the Third Circuit. No Court has ever come close to suggesting or saying anything like that. It was affirmed by *Novell*, the very case that my colleagues are relying on as being correctly decided in the very first paragraph. *Microsoft* is not overruled. *Microsoft* Court didn't

get it wrong because of *Trinko*. And by the way, *Trinko* is not the first refusal to deal case. Refusal to deal goes back to *Otter Tail* in 1973, I believe -- '83? I would have to get the date.

It goes back to *Aspen Skiing*. And *Aspen Skiing* predates *Trinko*. So it is not as if refusal to deal with rivals law didn't exist at the time of the *Microsoft* decision.

Now, you heard a lot of talk about effects. And I will admit this argument is actually a little bit confusing to me. I am not sure how much we disagree or don't disagree amongst each other.

So Apple argued we have to show an actual adverse effect on competition. And they're conflating that term with anticompetitive effect. Those are not interchangeable terms under the law. We, of course, have to prove anticompetitive effect. That is what *Microsoft* talks about. Anticompetitive effect means harm to the competitive process rather than harm to an individual competitor.

We don't have to prove an actual adverse effect on competition, which refers to, for example, a literal price increase directly tied to a specific action. As we explained in our brief, that is one way, one way, not the only way, one way that you can prove a violation under a different statute called Section 1 that is about when two companies agree to do something. So even under the statute that it is being cited

to, it is not the only way to prove effects.

It is even more foreign to Section 2. Section 2 cases are about things like maintaining a monopoly. They are about conduct that keeps you at the status quo. How would you prove that some specific action directly increased prices the next day, or something like that. It is not relevant to this statute.

I want to also say the case they talked to you about, that is a 1 case. And as you can tell just from hearing the discussion of it, it is incredibly different. It involves patents. Apple hasn't asserted any patent right that protects its conduct. Right? So -- and I think the fact that they are having to rely on Section 1 cases, that tells you what you need to know.

Now, there was also an argument about aggregation. There was an argument that *LePage's* says you can't aggregate conduct. That is not what *LePage's* says. What *LePage's* did, which is what all Courts do and is what we would certainly recommend that this Court ultimately do is it looks at individual actions and it determines what their -- if they are anticompetitive, what they value is. And in *LePage's* they were all anticompetitive, so the Court added it up. But the Court never said anything about whether if one action wasn't anticompetitive in itself, but it contributed to the overall scheme, whether that somehow has to be included. That is not

what *LePage's* says.

And cases like *Duke Energy* make that explicitly clear. What *Duke Energy* says -- let's get to the page -- it says you can't -- oh, I will just tell you what it says here. It says you can't add zero plus zero plus zero and get to zero. But it does say you can add zero plus one and that may equal more than one. So it doesn't say -- and we are not contending that if all of the actions we have alleged are all lawful, that that equates to more than zero, but what it says is actions could have a synergistic effect. That is the law. *Duke Energy* says it. There is also an activist decision in the Second Circuit that says it. That is the law. Conduct is considered together. It is not considered in isolation.

Now, your Honor, I am going to turn to the dismissal of individual allegations that Apple is raising, but before I do that, I want to pause in case there is any questions or anything additional I can answer for the Court about *Microsoft* or the general standard.

HON. JULIEN X. NEALS: Please continue, counsel.

MR. LASKEN: Okay. So Apple also asked this Court to dismiss anticompetitive conduct outside of the five examples because he thinks the monopoly playbook is undefined -- or, sorry, because they think the monopoly playbook is undefined and they want to Court to parse the complaint line by line to assess whether an individual allegation is conclusory in

isolation. Now, before I address that argument directly, there is an assumption in there that is just wrong. This is a quote. Here is my *Duke Energy* quote. It is a misapplication of antitrust doctrine for a court to treat a plaintiff's allegations of anticompetitive conduct as if they were five completely separate and unrelated lawsuits, effectively tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.

That is *Duke Energy* at 355. That is relying on *Union Carbide*, a Supreme Court case. These are not claims. These are means by which Apple undermines competition.

You can't isolate individual actions in a course of conduct to determine if they state a claim because they are not a claim. They are means to an end.

Now, there is two direct reasons why this fails as well.

First, the monopoly playbook is defined. Second, 12(b)(6) doesn't permit motions to dismiss allegations.

Now, as to the playbook, paragraphs 58, 59, and 119 define the playbook. Apple is engaged in a scheme to block consumers from being able to choose their smartphones based on their quality and price by undermining third-party products that benefit consumers while also making it easier to switch phones. They're chipping away at the consumer experience over time in select areas. That is the playbook. It is explicitly pleaded. We don't have to plead it in every paragraph. That

is more than enough to satisfy Rule 8(a).

Your Honor, I noted that Apple brought us to some quotes from cases, including -- and rules, including on slide 38. That is the second error that Rule 12(b)(6) and Rule 8, they are about claims. They are about what you have to state to state a claim.

So in slide 38 we have Federal Rule of Civil Procedure Rule 8(a), a pleading that states a claim for relief must contain a short and plain statement of the claim. This is not about what's required in an individual allegation. It is about what's required in a claim.

Slide 39, *Twombly*, a short and plain statement of the claim showing the pleader is entitled to relief. The claim here is a violation of Section 2 through a course of conduct. These are not individual claims.

And we know that when these rules speak of claims, it is not accidental because Rule 56 talks about dismissing a part of a claim or defense on summary judgment. It is not an accident that Rule 12 states a claim -- talks about claims.

Now, Apple also talked today about dismissing subtheories, and they raised that issue for the first time in their reply brief. That doesn't apply here.

The only case they've directed us to is *loanDepot*, or the only one I am aware of.

That is about a plaintiff lumping multiple breach of

contract -- sorry, not multiple breach of contract -- multiple tortious interference with contract claims into a single count. The question whether one contract was interfered with, that is easily severable from another. The concept can't be applied to anticompetitive actions in a course of conduct as I just told you. It would be error to do that.

Finally, your Honor, there is the pragmatic point, the point about narrowing discovery. This is not going to narrow discovery in any way. Rule 26(b)(1) allows matters, discovery in matters that are relevant into a claim or defense. It doesn't tie discovery to the fact of a specific nonconclusory pleading in the complaint. It is about relevancy. This case is about a pattern of business behavior. Discovery is going to be in the pattern and business decisions around things like API and App Review, Apple's decisions to sacrifice profits to avoid the rise of any product that works across phones like this others. There is not going to be detailed discovery, at least not on our account into the speakers inside an AirPod or something like that. That is not what this case is about.

So having a technology in or out, that is not going to affect the scope of discovery because that is not what this case is about.

Finally, a note on the argument, this was raised for the first time in the reply brief. So I do have some authorities I can direct the Court to with leave if the Court would like

them, but if not, I am happy to move on.

HON. JULIEN X. NEALS: You can do it.

MR. LASKEN: Okay. So *BBL, Incorporated v. City of Angola*, 809 F.3d 317 at page 325. That is a Seventh Circuit decision. Quote, Rule 12(b)(6) doesn't permit piecemeal dismissals of parts of claims. The question at this stage is simply whether the complaint includes factual allegations that state plausible claim for relief.

Abraham P. v. Los Angeles Unified School District, 2017. I know the court reporter is looking at me.

Westlaw 4839076 at *6. This Court's practice is not to dismiss parts of claims at the Rule 12 stage because unlike Rule 56, for example, Rule 12(b)(6) speaks of a motion to dismiss a claim, not part of a claim.

And then *In Re: American Express Anti-Steering Rules Antitrust Litigation, 343 F. Supp. 3d 94 at page 103,* under Amex's conception of Rule 12, the tail wags the dog. Amex's proposed rule would permit parties to move to dismiss part of a complaint on the basis that any one of the plaintiff's legal theories are faulty. The formulation of Rule 12 would warp the doctrine and make it much easier for a defendant to avoid answering a well-pleaded complaint where otherwise necessary.

Your Honor, that is how the complaint states a claim under the test that we brought this under, which is under the general balancing test.

Now, I want to turn to the refusal to deal with rivals argument.

Refusal to deal with rivals is a narrow theory of harm that applies to a specific fact pattern. It is one way that you can state a claim under Section 2.

Here, again, we have Apple litigating against ghosts and asking the Court to imply incorrect rules of law that conflicting with binding precedent. Its arguments fail for three reasons.

First, Apple's own characterization of the complaint's allegations place them outside of refusal to deal with rivals. Second, the complaint has to be assessed as alleged. And the complaint doesn't allege a refusal to deal with rivals theory. Third, even if the complaint were assessed under a refusal to deal with rivals theory, the allegations, if they're accepted as true, they state a claim.

So I want to start with just how the argument fails on its face. Apple repeatedly claims in its briefs more than a dozen times that this case is about challenging design decisions. At page 1 of its reply brief, it tells the Court, quote, the Court should recognize this case for what it is, an overreaching theory of liability that seeks to create law and impose judicial oversight over unilateral design decisions.

In the Third Circuit and others, challenges to design decisions are assessed under the general Section 2 standard;

that is the *Mylan* case.

It is error to assess product design cases under refusal to deal with rivals theory, that what's the Court -- Apple is asking the Court to again.

Now, again, we disagree with Apple's claim that it's a product design case, as I mentioned earlier.

Product design case are about improvements that a company makes to its own product. So what would a product design case be? It would be something like Apple harming competition by eliminating the headphone jack. Right? Apple harming competition by making the Apple silicon chip. That is a product design case.

But the point here is just that Apple's argument fails on its own terms and that is enough.

Now, there is a second problem. As I mentioned to you, we are chasing ghosts again. Apple is seeking to dismiss a different claim from the one we pleaded.

To understand this, we need to put the refusal to deal with rivals doctrine into context, context that has been omitted here.

As the *Duke Energy* Court recently explained, Section 2 focuses on anticompetitive conduct, not Court-made subcategories of that conduct. You can see that same thing in *LePage's* and *Microsoft* when it says you can't have taxonomy, you can't identify every version of this. We are focused on

anticompetitive conduct.

Now, over time Courts identified a few subcategories, that is what we are talk about; exclusive dealing, predatory pricing. Right?

And they may tests for them and Courts apply those tests if the plaintiff alleges a theory of harm that -- that is their theory of harm or if the conduct that is alleged fits neatly within that category.

Courts reject attempts like Apple to apply these -- to apply the subcategory of allegations that don't fit neatly within it. *Duke Energy* is a case like that. *Broadcom*, a Third Circuit decision that Apple didn't address is a case like that.

So refusal to deal with rivals, like exclusive dealing, like predatory pricing, it's a subcategory. It is one theory under which harm can be alleged.

So let's talk about what is in this theory and why the complaint is outside of it.

So, again, our case, like the *Microsoft* case, is about taking actions in one market to protect your monopoly in another. Refusal to deal with rivals claims are different. They assert that a monopolist monopolized a market by fail ing to cooperate with its competitors in that market; that is *Trinko* at 407 talks about that.

They identified the rare instances -- and this is why

they're narrow and this is why they're hard. Right?

They identify the rare instances when a monopolist has to lend a helping hand to its competitors seeking to challenge its monopoly by letting them share its infrastructure or copy its innovations.

That is not what we alleged. We didn't allege a failure by Apple to cooperate with smartphone rivals. So a refusal to deal here claim might go something like this. We heard all about the Apple silicon chip. So a refusal to deal claim might say Apple is monopolizing smartphone markets by failing to license or sell or give the designs to Samsung and Google for that chip so that they can make better phones and better compete with Apple. I think they are going to disagree on whether that would help their phones be better, but that's what the claim would look like. Right?

What is different here?

Take cloud games. How could restraining a cloud game app be refusing to deal with a rival? Apple doesn't sell a cloud gaming app. There is literally no rivalry at all. The fact that Apple happens to make a competing product in some other market or impacted, it market doesn't matter. It didn't matter in *Microsoft* that Microsoft made Internet Explorer in the market with Netscape, which was being suppressed. It doesn't matter here.

If you have any doubt, you can just look at what was

asserted in the seminal cases, *Otter Tail*, *Aspen Skiing*, which recognized the claim, *Trinko* and *LinkLine* which pulled it back.

Now, I talked about *Colgate* at the outset, but notice I didn't mention *Colgate* and that is because *Colgate* is not a refusal to deal with rivals case. It is not relevant to the question of what's in the box.

So what were the cases about?

Otter Tail was about a monopolist of the sale of power to towns who refused to share its power lines with people who wanted to compete with it to sell power to towns.

Aspen Skiing was about competing ski resorts. The monopolist wouldn't share its slopes with its competitor who was small and needed extra slopes to have the ticket be attractive so they could compete with the skiing monopoly.

Trinko was about competing phone companies and sharing the monopolist's phone lines.

And *LinkLine* was about competing internet service providers.

None of these cases are about monopolists taking actions with respect to third parties to protect their monopoly. And by the way, that long footnote in their brief, with the exception of one that is not a refusal to deal rivals case, not relevant here, they are all the same. It is all about people not cooperating in the market that is being monopolized.

And that is why Apple had to repeatedly edit the text of

cases in its brief. It had to bracket out "rivals" and replace it with "third parties" to make this argument. It is not what this doctrine is about. It is a different theory. It's a different context. It's a different claim. And had we brought it, it would have been a different case.

Now, Apple tried to rely on *LinkLine* to tell you that refusal to deal across market, that is still a refusal to deal. That doesn't provide support for the idea that refusal to deal with rivals applies outside of a monopolized market.

Now, an important fact about the cases that was omitted is that in those cases the monopolist was compelled to deal by statute. So what happened is that in 1996, Congress passed an act called the Telecommunications Act that required phone providers to deal with their rivals. That is what happened. They were never going to deal. They were going to refuse to deal, but Congress passed a law that says you have to deal. So people started challenging the terms.

As *Trinko* explains, the sharing obligation imposed by -- this is a quote -- by the 1996 act created something brand new. Quote, the wholesale market for leasing network elements; that is at page 410.

This wasn't a cross-market case where you had people making one product here and another there. You had a statute that created a unique market structure. That is not some statement from the Supreme Court that meant to overrule

Colgate, meant to overrule all sorts of cases, right, that involved with dealing with people in other markets.

What is an exclusive dealing provision? You are dealing with someone. Right? It is a term of dealing with a third party.

What were the bundled discounts in *LePage's*? They are terms on which monopolists sells products its to people. Right?

All of those cases are wrong if you buy this argument that refusal to deal with rivals law -- or I shouldn't -- I mean -- well, that the argument that you are allowed to put any term you want into a contract with a third party because your right to deal lets you do that.

Now, *Novell* also doesn't support the claim. In the very first paragraph, *Novell* expressly validates *Microsoft* and *Microsoft* involved an adjacent market, as I just talked about, with rivals.

And while it's true that *Novell* involved APIs, that is where the similarities end. It is not the what, it's the how. It is the context.

Now, Novell made WordPerfect. Novell was about code that WordPerfect could have written for itself and that would have appeared in something like Word, but then it wanted Microsoft to be forced to write for it in the form of an API. That is just nothing like this case. We are not talking about

anything developers can do for themselves that they want Apple to do for them. These are restrictions.

And then there is the case history of *Novell*. *Novell* actually involved a claim about *Microsoft* monopolizing applications markets, that was the lead claim, in which Word and WordPerfect were rivals by terminating a prior course of dealing. That claim was time barred, so they tried to pivot to a *Microsoft* theory. That maneuver failed, but not on the pleadings. There was an eight-week trial. And at the trial they failed to show that they were middleware. They failed to show there was harm to operating competition. So even there, the Court didn't rewrite the pleadings to put refusal to deal with rivals law into the case.

And, your Honor, if you take this argument to its logical end, that rivalry anywhere somehow makes refusal to deal rivals law apply, think about the absurd results that would follow.

What if Apple and a cloud game are making T-shirts and they are competing to sell the T-shirts? Does that mean that every time that there is a restriction on a cloud game, it is refusal to deal with rivals because there are rivals somewhere?

Now, Apple also talked about *Meta*. And Apple claims *Meta* controls because it involves the same theory of the case here, withholding API access.

Now, first of all, cloud games and super apps don't

involve API apps. But leaving that aside, Apple is just wrong about *Meta*.

So in slide 12, your Honor, they gave the Court a quote from *Meta* about a policy that they claimed proves that this case is a refusal to deal. This is what the DC Circuit said about the analysis of that policy. It said, The District Court correctly analyzed the policy under cases discussing exclusive dealing.

Apple is just wrong. The DC Circuit didn't analyze this as a refusal to deal. It did the exact opposite of what Apple is saying it did. It proves the point that not every API restriction, not every decision to give or not give access is a refusal to deal.

Now, *Meta* challenged multiple API restrictions to be clear. And the only ones that were analyzed as refusals to deal there were the ones called core functionality restrictions. Those were ones that were designed to block Facebook's rivals from duplicating Facebook's core monopoly products.

We are back to the theory it was conduct that was designed to not share with your rivals for the monopoly products. So that is a refusal to deal and that holding doesn't track here. We are not asserting that Apple violated antitrust law by withholding API access to stop other smartphone companies from duplicating its core products, like

iPhone or iOS. That is not the claim.

And by the way, your Honor, in *Meta*, the Court went on to point out -- excuse me -- that there were other facts that if pleaded, facts about the importance of the app to being cross-market -- or sorry -- cross-platform, working on multiple platforms, if they had pleaded more about the fact that that harmed competition, they would have stated a claim.

We pleaded 70 pages of facts about how these things matter to competition and why it matters that they are cross-platformed. So *Meta* doesn't support Apple.

If anything, it establishes that API restrictions can be unlawful; and if they are having cross-platform defects and you say that in a complaint, you stated a claim.

Now, your Honor, there is an additional point to note about *Trinko* and *LinkLine*. As I mentioned to you, in those cases the monopolist was not dealing voluntarily.

The monopolist was compelled to deal because the Telecommunications Act forced them to do that.

The Third Circuit has pointed out that that difference matters. In *Broadcom* the Third Circuit held that a monopolist refusing to license its intellectual property on fair terms was not a refusal to deal.

Why did it hold that? Because the monopolist had agreed to license the technology voluntarily. The monopolist chose to deal. Once you choose deal, you can no longer claim that the

terms of those deals fall under a doctrine about refusing to deal. At that point, the terms are subject to antitrust scrutiny like any other. And the Court distinguished *Trinko* explaining it didn't apply to voluntary dealing. Right?

The question in *Trinko* was something who was never going to deal, if they were going to refuse to deal, if a statute comes along and says you have to deal, does antitrust law give the plaintiff the right to then say the terms of that compelled dealing are unfair when they would have always refused to deal to begin with? The answer to that is no.

That has nothing to do with a situation where a monopolist voluntarily decides to deal.

And that dealing by regulation, that is not this case. Apple is not dealing with developers because regulation compels it to do so. Apple's begging developers to deal with it. And it's selling its products based on what they do for Apple. That's the "there's an app for that" campaign. It doesn't have a product without these deals. It is not refusing to deal. It doesn't get to put anticompetitive terms into the deals.

So having addressed all of that, there was some discussion about why refusal to deal, why does this box exist? Isn't it important to apply it cross markets?

If you read *Trinko* and understand why it was applied, it actually becomes very clear that it doesn't work across markets.

So the first consideration in *Trinko* was something called free writing. Free writing is what happens when a competitor can copy the monopolist's work rather than doing its own. That gives the monopolist and the competitor less reason to invest. For example, if Apple had to make the Apple silicon chip available to rivals, to Google, to Samsung after it made it, would it have the same reason, the same incentive to create the chip? Maybe not. Right?

What incentives are there for its rivals if they know they can copy it after its made?

If you change that to our case, if you change it to nonrivals here, it doesn't apply. Take sharing an API with a digital wallet maker to let them Tap-to-Pay. Regardless of the sharing, the wallet maker is not going to write a phone operating system API. There is no incentive loss for them to do that. They don't make a phone. Assuming Apple needs to compete on the merits, it is going to be incentivized to make that API anyway, which by the way, this is why APIs are made. The primary reason for an API is to share it with developers to get to write for your platform.

Apple needs the API because it is going to have to allow its users to make digital payments. Otherwise, you will have smartphones with that functionality who are going to chip away at Apple.

Again, if they are competing on the merits.

The second consideration is increased opportunities for collusion.

This one, again, is obvious. Publishing an API is not going to increase the opportunity for collusion. That involves Apple putting documentation on the Internet. It doesn't give an additional opportunity for Apple in a watch maker to sit down and agree to watch prices. Nor does removing a rule and App Review. There is no additional or new interaction between Apple and a rival that is going to lead the price fixing or otherwise if you undo the illegal conduct.

But having Apple and smartphone rivals sit down and talk in depth about the prices for the Apple silicon chip and how to put that into a phone, forcing them to do that, that obviously gives rise to connection where there wouldn't be one, discussions about prices for a product, that is the collusion concern.

That only applies in the monopolized market.

The third consideration is administerability of remedy. This, again, applies to private cases about monopolize d markets. In those cases, where the monolopist was never going to deal, the Court would be forced to fashion the remedy out of whole cloth because there was nothing to benchmark against because there was never any deal. In other settings there is plenty to benchmark against. Apple deals with developers all of the time. There is no benchmarking problem when you get out

of that monopolized market in which they refused to deal.

That is before the fact that you get to this is a government case. That provides an array of options for relief for the Court that don't involve being a central planner.

Now, your Honor, for the reasons I just discussed, this case doesn't involve a refusal to deal with rivals claim, whether you use our characterization of the conduct or whether you use Apple's. But the complaint states a claim, even if the Court were to analyze it this way.

First, Apple concedes in its reply brief that *Otter Tail* establishes a refusal to deal where the monopolist deals with some people but not others, regardless of prior course of dealing or other evidence.

Now, Apple makes the naked assertion that the complaint doesn't contain these allegations. We are back to the ghosts. Apple can't win dismissal by claiming allegations aren't in the complaint when they are. The complaint pleads discriminatory dealing repeatedly, including in paragraphs 41 and 119, which discussed Apple's selective use of App Review and private APIs to kill off competitively threatening apps and accessories while treating others differently. And they confirmed that for you at the tech tutorial. They deal with lots of people. Right?

Those uncontested pleadings must be accepted as true and they match *Otter Tail*. That is a binding Supreme Court

precedent, that is enough.

But we have alleged more than that. We have alleged that the proper test for -- sorry.

The proper test for refusal do deal with rivals claim is found in the *Viamedia* opinion, that a Seventh Circuit opinion. It asks whether the refusal is predatory and it looks at a number of factors, and you can find those pleadings discussed in our brief at pages 37 to 38.

Apple tries to avoid that test by turning to the Ninth Circuit's ridged test and it claims that you can only make out a refusal to deal claim if a monopolist terminated an exact prior course of dealing and that the only conceivable purpose was sacrificing short-term profit for long-term gain.

Now, I didn't hear that test articulated that way here and that maybe is important, maybe it's not. Right?

But what is important about the test in the brief is that it conflicts with *Broadcom*.

Broadcom involved only generalized dealing. It doesn't involve the termination of an exact prior course of dealing and it never referenced an only conceivable purpose standard.

And I should say in *Broadcom*, the Court after saying it wasn't a refusal to deal went on to say even if it was, this was is how the test would be met. So that's how you get that analysis alongside the -- what's in the box.

Host, which Apple also purports to rely on, never

references an only conceivable purpose requirement. And *Revlimid*, which is a District Court decision in this District that conflicts with the weight of authority in this District, while it does limit it to two factors, it reads them far more broadly than Apple.

Revlimid finds that proof of generalized dealing satisfies the prior course of dealing element. That is how *Revlimid* deals with *Broadcom*. So *Revlimid* doesn't help Apple either.

Now to be clear, we do think the right approach is the majority approach in this District because we do think that the other opinion is in conflict with *Otter Tail* and *Aspen Skiing*.

But having said that, even if you apply the two-prong test, which Apple is asking you to do, even if you are looking for prior course of dealing in profit sacrifice, as we said in our brief, we've alleged those things. Apple has a prior course of dealing. Apple, quote, made, quote, an important change in a pattern of distribution -- excuse me -- that had originated in a competitive market. That is a quote from *Aspen Skiing*. That is a Supreme Court case. That is what a prior course of dealing is.

Apple invited third-party developers to create app for the iPhone. It begged them to create apps for the iPhone. It tried to do it without them and it couldn't. And then it sold the phone to consumers based on those contributions; that is in

paragraphs 38 and 39. Then Apple changed its course and imposed tight controls on app creation and distribution when competitive threats arose; that is in paragraphs 22, 67, and 101.

And Apple also changed course with APIs. They turned from public APIs to private ones with respect to smartwatches.

And the short-term profits Apple sacrificed, they are staggered and they are all over the complaint; paragraphs 40, 51, 62, 70 to 71, 80, 131, 133. As one example, Apple gave up its 30 percent commission on super apps and cloud games in order to suppress a competition among phones. That is a profit sacrifice.

Now, Apple tried to claim that is conjecture. It is not conjecture, your Honor. As they pointed out, we have a four-year investigation. We are not guessing on what happened. But for today what matters is it is a well-pleaded allegation. And, of course, we will prove it at trial.

But again, today, what matters is it is a well-pleaded allegation.

So even under the two-part test, the claim is pled. That is enough, too.

Now, your Honor, I didn't actually hear anything about attempted monopolization today, but because it is in the briefs, I'm going to address it very quickly.

So attempted monopolization has three elements and Apple

is contesting one, specific intent to monopolize. The other two, dangerous probability of success and anticompetitive conduct are not contested so I am not going to address those.

Now, the way Apple put this argument in its brief can't explain better what is going on here. I'm going to read you from reply brief at page 14.

They say we haven't pleaded anticompetitive intent because, quote, Apple -- we pleaded -- the complaint's allegations plead that Apple sought to make the iPhone more attractive to consumers.

We didn't plead that. That is not the complaint in this case. We didn't plead that they tried to make the iPhone more attractive. That is their factual defense. That is their defense at trial, and they can raise that defense about the conduct, but not here.

What governs here what we pleaded. Then they say, Or purported sacrificed short-terms profits from apps Apple viewed as inconsistent with platform privacy and security.

We didn't plead that they sacrificed profits to protect private and security. That is not the complaint in this case, your Honor. That is their defense. That is their fact defense, and they're entitled to that was defense and nobody wants to stop them from putting on that defense, but that is for trial.

To dismiss the case on the pleadings because of that,

because those allegations are most reasonably viewed as predominantly motivated by legitimate business aims, it is not what we pleaded. Right? It is just not what we pleaded. That is not a basis to dismiss the complaint.

So we are -- again, we are back to litigating against ghosts. The complaint we filed didn't accuse Apple of violating antitrust law by making the iPhone attractive to consumers.

Now in the interest of time, I am just going to discuss one example of the actual intent evidence. It is in paragraph 71 of the complaint and it is about cloud gaming.

In that paragraph it says, Apple was trying to avoid a world where, quote, all that matters is who has the cheapest hardware.

And they are talking about suppressing cloud games here. That is a literal statement of an intent to block price competition over phones by undermining cloud games. Hardware, cheapest hardware. They don't want to get in a fight over who has the cheapest hardware. Right? It is hard to imagine a more direct statement of intent than that.

In addition, as we explained in our brief, intent can be inferred from the conduct anyway.

Thank you, your Honor. I am going to turn things over to Ms. Pitt to address the States' standing issue.

MS. PITT: Good afternoon, your Honors, and may it

please the Court.

My name is Isabella Pitt, Deputy Attorney General for the New Jersey Attorney General's Office, appearing for the 20 plaintiff States, acting by and through their respective Attorney General's Office in this matter.

I will address how the States have alleged a sufficiently quasi-sovereign interest and my colleague, Giancarlo Piccinini, will address why the *Harrison* decision is in opposite.

New Jersey and the other plaintiff States are participating in this case because we have to parens patriae standing to sue Apple.

In a three-sentence footnote in their brief in support of this motion to dismiss, Apple argues otherwise, wrongly suggesting the States lack standing to participate. But the plaintiff States have asserted a quasi-sovereign interest sufficient to establish parens patriae standing here.

As Apple's counsel noted, we have done that on paragraphs 192 and 193 of the complaint where we explained that the States are further fulfilling their duty to protect their States' populations from anticompetitive conduct that distorts market fairness and harms consumers with higher prices, few er choices, and stickier products as is alleged in the complaint.

The leading case on parens patriae standing is the Supreme Court's decision in *Alfred L. Snapp & Son*. According

to that case, the States have standing if we assert a sufficiently concrete quasi-sovereign interest, the injury to which affects a substantial segment of our population.

As the *Microsoft* Court made clear, it is beyond dispute that the federal antitrust laws provide statutory authorization for claims brought by a State in its parens patriae capacity. More specifically, the Clayton Act expressly permits State Attorneys General to bring a civil action in the name of such state as parens patriae on behalf of natural persons residing in such state. And the Clayton Act further authorizes State Attorneys General to seek injunctive relief in those suits to remedy a threatened loss or damage by a violation of the antitrust laws.

Thus, a State may proceed in a parens patriae capacity where, as here, the case in substance implicates the State's interest in economic supervision.

As the Eastern District of Pennsylvania noted only two years ago in *In Re: Generic Pharms Pricing Antitrust Litigation*, the State's interest in economic supervision is independent of the benefit that might accrue to any particular individual.

Meaning, it is irrelevant that a private action has been filed here. Or private actions. Because the Attorney Generals are the chief legal officers of their respective states and they stand to ensure that the benefits of the federal system,

including the federal antitrust laws, are not denied to the general population.

A State's interest in preventing harm to its citizens by antitrust violations is a prime instance of the interest that the parens patriae can vindicate. Consistent with these standards, States have a well-recognized quasi-sovereign interest in ensuring that our citizens are not denied the benefit of lower prices that would result from the market participant's adherence to fair marketplace regulations and insuring that those who sell products to their citizens abide by the federal antitrust system.

As the complaint makes clear, this is not a case of simple individual consumer grievances. Rather, it strikes at the heart of the plaintiff States' quasi-sovereign interest in protecting the economic wellbeing of our citizens and ensuring fair market competition in our economies against Apple's violations of federal and state antitrust laws.

Apple's anticompetitive conduct has resulted in concrete and demonstrable injuries to substantial seg ments of the plaintiff States' population. With a market share of greater than 70 percent and 250 million devices in the United States, the sheer scale of Apple's market penetration truly underscores the widespread impact of its conduct on the plaintiffs' States' economies and the economic health of our citizens.

Apple's conduct has led to inflated prices, restrictions

on consumer choice, and barriers to switching to less expensive alternative technologies. These are not isolated incidents. They represent a systemic pattern of behavior with far reaching consequences for our markets and residents' economic health.

Accordingly, the plaintiff States are not simply nominal parties in this case. They are exercising their legitimate authority to protect their citizens from anticompetitive conduct that distorts market fairness and harms consumers. Apple's conduct, as detailed at length in the complaint, does not adhere to fair market practices and federal and state antitrust laws, thus directly implicating the plaintiff States' well-established quasi-sovereign interest in supervising our economies and ensuring our citizen's economic wellbeing.

Apple's suggestion to the contrary fights clearly established law authorizing the suit and the Court should reject it.

In closing, the plaintiff States presence in this case is fundamental as our participation underscores the critical need to uphold antitrust laws at all levels of government as a safeguard.

The quasi-sovereign interests we represent, the tangible harms endured by our economies and residence, and unequivocal authority under federal law substantiate our standing in this case, a case that reflects each of our States' commitments to protecting the marketplace and competition.

And with the Court's permission, I will now yield the podium to my colleague, Giancarlo Piccinini to address the *Harrison* case.

HON. JULIEN X. NEALS: Thank you, counsel.

MR. PICCININI: Good afternoon, your Honor. Giancarlo Piccinini, Deputy Attorney General, on behalf of the State of New Jersey and plaintiff States.

Apple relies on *Harrison v. Jefferson Parish School Board* to argue that the plaintiff States lack standing in this case, but Apple is wrong about that for two principle reasons.

First, *Harrison* is inapposite both factually and procedurally. And, second, Apple misstates the law of parens patriae and, specifically, the law of state standing in doing so.

And for both of those reasons, the Court should reject its attempt to use *Harrison* as a basis to exclude the States from this action.

First, *Harrison* is distinguishable both on its own facts and procedurally. That case involved a suit brought in state court by two students against the local school board after the school board disciplined those students for brandishing BB guns during virtual class back during the pandemic. The school board removed the case to federal court, and Louisiana then intervened. After the students settled out of the case, leaving only the Louisiana as a plaintiff in an action against

a state subordinate in federal court. This case, by contrast, could not be further from *Harrison*.

This is a government enforcement action brought pursuant to a statutory cause of action, authorized by Congress, to vindicate the federal antitrust laws against a respondent that has been accused of violating those laws.

That leads to my second point, that Apple misunderstands the law of parens patriae standing and asserts that the States need to assert a sovereign interest in order to justify parens patriae standing here. That mistakes two separate theories of standing for States and here only one theory is applicable.

The reason: Congress said so. 15 U.S.C. Section 15(c) says that States can proceed in their capacity as parens patriae on behalf of natural persons residing in such States.

Here, the States have alleged a sufficient quasi-sovereign interest to justify its parens patriae standing. Here the States need not assert a sovereign interest and that is because a sovereign interest is only applicable in suits that are sovereign suits. In fact, the Court in *Harrison* recounts the differences between those two theories of standing, and here only one is applicable.

So Apple's urgings the contrary, that the State need assert some impairment of a right to enforce its laws is completely inapposite in a case like this where the States are proceeding in their capacity as parens patriae.

And so, further, in *Harrison*, the Court notes that a quasi-sovereign interest is one that emanates outside of the State's sovereign authority. Further underscoring the fact that Apple is wrong about the need to assert a sovereign interest in this case to establish standing for the plaintiff States.

I won't rehash or reargue why we have asserted a sufficient quasi-sovereign interest here. The point being that that is all the States need to show, in addition to the irreducible constitutional minimum for Article III standing, which the plaintiff States have alleged in spades in the complaint.

The Court should reject Apple's attempt to invoke *Harrison* as grounds to exclude the plaintiff States, a Fifth Circuit decision that is being misinterpreted and misapplied in this matter.

And with the Court's permission, I will yield the podium to the Department of Justice to conclude today's presentations.

HON. JULIEN X. NEALS: Thank you.

MR. LASKEN: Thank you, your Honor.

Apple's motion should be denied because it seeks dismissal by disputing facts and challenging the viability of claims that were not brought all under rules of law that don't exist.

No Court has ever held that to be illegal, conduct has

to fit in a box.

By the way, *Microsoft* is not an exclusive dealing case. There were -- it was a course of conduct and certain pieces of it were exclusive dealing. There was an exclusive deal with Apple. So when the Third Circuit is talking about that, they are talking about parts of the case, right, different elements that were that.

But nobody said that when *Microsoft* told people you can't change the Start menu, that that is exclusive dealing. That is not what the case is about.

Refusal to deal with rivals law, it applies to cases about rivals and on a 12(b)(6) motion, the allegations in the complaint are taken as true. If Apple wants to dispute the words of its executives, there is a time and a place for that and it is trial.

Look, antitrust law can be complex and today has certainly demonstrated that, but it is also quite simple.

Antitrust law requires Apple, or any company, to compete only on the merits of its products every day, all day. That is what it requires.

If Apple stopped doing that to win sales in another way, as in *Microsoft*, by suppressing cross-platform technologies, it violates Section 2. Or if Apple keeps competing on the merits but adds strategies that contributed to winning sales in another way, it still violates Section 2.

Your Honor, Apple has no right to monopolize a market through conduct, other than competition on the merits, so long as it comes as part of a deal. The right that Apple claims to be exercising, that has been a the literal definition of illegal conduct since *Colgate* in 1919.

Take the allegations of the complaint as true, that is what we would ask the Court to do. Stack them up against cases like *Dentsply* and *LePage's* -- and by the way, *Dentsply* tells you that for a monopoly maintenance claim, that thing that you were -- that was suggested that we have the wrong standard, it literally says the standard for proving a monopoly maintenance claim is reasonable probability that it contributed to -- I don't have it in front of me, but maintaining a monopoly. It doesn't talk about actual price increases.

So take the allegations as true. Stack it up against cases like *Dentsply* and *LePage's* and *Microsoft*. You will see the complaint easily states a claim.

For those reasons and the reasons in our briefs, your Honor, we would ask that Apple's motion be denied. And we would ask that the Court move forward into discovery as soon as practicable, in light of the ongoing harm to Americans and American businesses whose products are being suppressed, consistent, of course, with the Court's schedule and preferences.

Thank you, your Honor.

HON. JULIEN X. NEALS: Thank you, Mr. Lasken.

MR. LASKEN: And I should say, if there are questions, I am happy to answer them.

HON. JULIEN X. NEALS: I am going to hear from your adversary first.

MR. PRIMIS: Thank you, your Honor. You have been very generous with your time, so my colleague and I will be brief in response.

Mr. Lasken -- I am going to address, again, the refusal to deal point, and Ms. Allon will cover the other points.

Mr. Lasken said something that caught my attention as he was arguing. He said, Apple is being clever. They shouldn't get away with this because they are being clever.

He said that after going through all of the cases that I addressed and distinguished when I was arguing, cases like *Lorain Journal* and *Kodak*, which had exclusive dealing arrangements that prohibited customers from dealing with direct competitors.

Again, none of which exists here.

Mr. Lasken addressed the *Microsoft* case and he acknowledged it is different. It is quite different than here, but Apple shouldn't get away with it because they are being clever.

There is no "being clever" doctrine of antitrust law. There is no huge exception to the refusal to deal doctrine that

I described because the government believes someone is being clever. It is not a catch-all. The reason I showed the quotes and the specific conduct from *Trinko* is because I think if you match it up in the transcript, it will line up exactly with what Mr. Lasken said, about discriminating against competitors, about putting yourself first, about doing all of these things in a way that makes it more difficult to switch. That is all in *Trinko*. It is all in *Novell*. And I don't believe Mr. Lasken addressed any of that.

With regard to the point about having to be a rival and the specific market that the government pled, the government is setting up a scenario -- well, first, I would just say Apple does have rivals in watches, in messages. It has its own operating system which they claim would be jeopardized by super apps. Wallets. All of these things. So the doctrine applies to that.

But even taking a step back and saying if they are right about what it means to have to, you know, have a rival in the pled market for this doctrine to apply -- and I think Mr. Lasken acknowledged what I am about to say.

If Samsung came to Apple, a smartphone maker came to Apple and said, Boy, we would like you to change your App Store Guidelines because it would really help super apps and mini programs, that would make it easier for people to leave Apple and come over to Samsung, would you do that for us? That would

not last five minutes in Court. And I think Mr. Lasken acknowledged that. It would be rejected under *Trinko* and all of the cases I described.

But what they are saying is that if an app developer or if the government comes in and says, hey, we would like you to do these things for Samsung and Google to facilitate switching to their product, all of a sudden instead of getting the benefit of *Trinko* and *LinkLine*, now we are subject to years of litigation under a *Microsoft* balancing test when the conduct is exactly the same. And if you recall, this is conduct at Judge Gorsuch, when he was on the Court in *Novell*, he said this type of conduct is almost never harmful to consumers.

So for those reasons, we think the government has not made the appropriate showing to show the refusal to deal doctrine doesn't apply here.

And with that, I will hand it over to Ms. Allon.

MS. ALLON: Thank you, your Honor. I'll just address two of our arguments briefly.

First is effects. To the effect -- to the extent the government is suggesting it does not need to show anticompetitive effects at the pleading stage, that is wrong. Effects is not just a Section 1 requirement. *Microsoft* and *Dentsply* were both Section 2 case s that required anticompetitive effects.

The government does not cite any cases suggesting that

the analysis operates differently in a Section 1 and Section 2 case.

Mr. Lasken quoted from page 79 of *Microsoft* about what the Court can infer. Again, that is a discussion of causation. It has nothing to do with effects. It is certainly not purporting to set out a pleading standard or in any way trump Rule 8.

We know what the Court can infer. The government is entitled to the benefit of all plausible inferences, but it needs facts to plausibly justify its inferential leaps.

And on that slide 16 with the chain, I gave the government the benefit of all plausible inferences. And even so, we have speculative steps. We are guessing at what both developers and consumers would do. And the government has not provided facts that allow this Court to draw the kinds of inferences the government needs to get from the alleged conduct to the alleged harm.

So we would suggest that this Court should follow guidance from decisions like *IDT* and *Miller*, which confirm that this is a pleading-stage issue and dismiss the government's complaint on that basis.

On *Twombly*, the government does not have a real response as to why the allegations in paragraphs 119 to 125 and 136 to 140 should survive.

Your Honor's decision in *Stepan*, *Judge McNulty's*

decision in loanDepot made clear that this is a proper ask on a motion to dismiss. It wasn't raised for the first time in reply. We cited both of those cases at page 39 of our opening brief.

But regardless, all of the cases Mr. Lasken cited to the contrary are outside of this district. There are three cases that have addressed this issue in the District of New Jersey. *Stepan*, *loanDepot*, and *Lincoln Harbor LLC v. Hartz Mountain Industries*, that's 517 F.Supp 293, all came out the same way. They all confirmed that it is within this Court's discretion to limit the claims that stay in the case to well-pleaded allegations.

The government cannot satisfy Rule 8 by making vague references to dozens and -- of products -- of products and services just because the government alleges some playbook for how Apple purportedly engages in anticompetitive conduct.

Two weeks ago, the United States told this Court it will need to understand the how, the what, and the why. What technologies Apple restricts, how it restricts them, whether through APIs they are private or contractual means, and why that matters for smartphone competition. I couldn't agree more. That is what Rule 8 requires.

And the lack of any alleged facts going to those points is particularly egregious given the four-year investigation, the millions of documents that the government received from

Apple, the 15 depositions the government took. There is no excuse for the government's failure to include real, concrete allegations, if it has them, as to these dozens of other products and services.

And, finally, let me just discuss the point about discovery and whether it can be effectively managed with these allegations in the case.

In its additional disclosures, which the government served on August 23rd of this year, the government listed 111 third parties, including many whose only connection is to these additional products and services. So, for example, the government listed Ford and General Motors of the CarPlay allegations, Peloton about the fitness apps, the *New York Times* and the *Financial Times* about subscription news services.

As a practical matter, the parties and third parties will not be able to efficiently conduct discovery on issues like CarPlay, fitness apps, or subscription services because the complaint gives no indication about what the government thinks is relevant to this case.

So dismissing those conclusory allegations now, which are legally deficient under Rule 8, will avoid miring the Court's and the parties in prolonged discovery disputes about what requests are fairly inbounds and which are not, which is exactly what *Twombly* was designed to achieve.

The government wants to pursue a case it did not plead

under antitrust laws that do not exist. On issue after issue, the government asks this Court to ignore binding precedent from the Supreme Court in *Trinko*, *LinkLine*, *NCAA*, and *Twombly*, and the Third Circuit in *Host*, *Mylan*, and *Dentsply*.

This Court should not be the first to entertain the government's sweeping new theories of antitrust law and complete disregard of federal pleading standards. We would ask for the government's case to be dismissed in its entirety with prejudice.

Thank you, your Honor.

HON. JULIEN X. NEALS: Thank you, Counsel.

You look eager, Mr. Lasken. Did you have anything you want to add?

MR. LASKEN: Well, there was a lot of what I would agree, so I will -- I will keep it short, your Honor.

So, first, it was said that I would agree with the idea that if Samsung came to Apple and said change your App Store rules to help some cross-platform app, that that would be lawful. I don't agree that that is lawful. That's not the question. The question isn't who is doing the asking. Right?

The question is -- you know, we have got some cleverness again -- right?

The question is what is the effect of the restriction on competition. Right? The theory in refusal to deal with rivals case is you are not sharing it with me.

Samsung in that hypothetical, they're not asking Apple to share something with Samsung. They are saying stop restraining other people. Right?

So the fact that Samsung asks doesn't make it legal or not. That is a hypothetical that is just outside the bounds. The theory is I am Samsung -- I need you to share -- there is no lines in this case -- I need you to share your phone lines with me so I can compete with you. I need you to share your chip so I can copy it and compete with you.

It is not Apple's infrastructure. It is not what those cases are about, so I don't agree with that.

Now, on the initial disclosures point, this is a little bit of a government antitrust thing. We always get interrogatory and complaints when people don't tell us everyone we've ever talked to. So we were trying to be helpful and tell them basically everyone we've talked to. Right? If we didn't do that, we would get a complaint that our disclosures were too narrow. Right?

Just because someone is on disclosures doesn't mean they're going to be in the case. We even offered to give them an early preliminary witness list, so they would know exactly who is going to be at issue. They didn't want that. Right?

So they are lots of ways -- and we have an excellent magistrate judge who we have been in front of already who can handle this.

You know, there are a lot of ways we can keep discovery reasonable without violating the basic premise of Rule 12(b)(6) that we assess complaints to see whether they state a claim, which, by the way, is how we read your Honor's opinion, but it seems odd for us to get in a fight over that in front of you, your Honor.

But any way, that is all I wanted to say.

Thank you, you Honor.

HON. JULIEN X. NEALS: Thank you.

Counsel actually addressed pretty much every question that I had, to be very candid with you.

We are really going to put a lot of effort into this to have a decision to you by January. That is being realistic with the fact that we are up against the holidays right now. You are not our only case. You cited one of my other ones, *IQVIA*, which is a citation by opinion. If anyone who has read anything about *IQVIA*, you know that one is quite interesting as well.

Again, thank you, counsel, for your thorough argument, and we will also be conferring with her Honor as well with regard to discovery.

Our pretty much hope is that once we get to January, during that month, you will have a discussion as well.

So I thank you all. And I thank the MDL-interested group for attending as well.

And have a good Thanksgiving, all. Thank you, again.

THE COURTROOM DEPUTY: All rise.

(Whereupon the proceedings are adjourned at 2:55 p.m.)

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FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/S/ Melissa A. Mormile RDR, CCR, CRCR 11/20/2024

Official Court Reporter Date